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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

DAVID KEITH HENSEL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

1. Whether the absence of any legal authority for the warrantless search of a foreign vessel on international waters without the consent of the flag state compels the suppression of evidence seized during the search.

2. Whether a United States citizen, who is the captain of a foreign merchant vessel, may invoke the exclusionary rule to suppress evidence seized from the ship during a warrantless search on the high seas, made without legal authority and in violation of international law.

3. Whether 14 U.S.C. § 89(a) gives the United States Coast Guard authority to board and search a foreign vessel on international waters without the consent of the flag state.

4. Whether the United States Coast Guard may board and search a foreign vessel on international waters without a warrant in the absence of exigent circumstances making it impossible to obtain one.

Table of Contents.

Opinions below 2

Jurisdiction 2

Constitutional provisions, statutes, treaties and regulations involved 2

Statement of the case 5

Reasons for granting the writ 7

I. The decision of the Court of Appeals below is in conflict with the applicable decisions of the Supreme Court 7

A. The Court of Appeals misinterpreted this court's decision in *United States* v. *Ramsey*, 431 U.S. 606 (1977), when it sustained a warrantless search on international waters for which there was no legal authority 7

B. The Court of Appeals resurrected a standing requirement in the litigation of Fourth Amendment claims, contrary to this court's ruling in *Rakas* v. *Illinois*, 439 U.S. 128 (1978) 12

II. The decision of the Court of Appeals below creates conflicts in the decisions of the Courts of Appeals 14

A. The Court of Appeals, in cases involving searches of foreign ships on the high seas, are in conflict as to whether the principles of *United States* v. *Ramsey*, *supra* or *United States* v. *Caceres*, *supra*, apply to the need for legal authority for such a search 14

B. The Courts of Appeals are in conflict as to whether Title 14 U.S.C. § 89(a) provides authority for the search of a foreign vessel on international waters without flag state consent 16

Conclusion 18

Appendix follows page 18

Table of Authorities Cited.

CASES.

Delaware v. Prouse, 440 U.S. 648 (1979) 11
Donovan v. Dewey, 452 U.S. 594 (1981) 13
Greene v. McElroy, 360 U.S. 474 (1959) 9
Hannah v. Larche, 363 U.S. 420 (1960) 9
Katz v. United States, 389 U.S. 347 (1967) 10
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 13
Miller v. United States, 357 U.S. 301 (1958) 8, 11, 12n, 15
Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 16
Rakas v. Illinois, 439 U.S. 128 (1978) 12, 13
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 9
United States v. Caceres, 440 U.S. 741 (1979) 8, 11, 13n, 14, 15
United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) 16
United Statse v. Garcia, 672 F.2d 1349 (11th Cir. 1982) 15
United States v. Green, 671 F.2d 461 (1st Cir. 1982) 10n
United States v. Hensel, 509 F. Supp. 1364 (D. Me. 1981) 2
United States v. Hensel, 699 F.2d 18 (1st Cir. 1983) 2
United States v. Hilton, 619 F.2d 127 (1st Cir. 1980) 11n
United States v. Piner, 608 F.2d 358 (9th Cir. 1979) 11n
United States v. Postal, 589 F.2d 862 (5th Cir. 1979) 16
United States v. Ramsey, 431 U.S. 606 (1977) 7, 8, 14
United States v. Salvucci, 448 U.S. 83 (1980) 12
United States v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979) 15

United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc) 8n, 15, 16

Weinberger v. Rossi, 456 U.S. 25 (1982) 16

STATUTES.

United States Constitution

Fourth Amendment 2, 8, 10, 12n, 14

14 U.S.C.

§ 89(a) 3, 7, 8n, 10, 12 et seq.

§ 143 8n

18 U.S.C. § 3109 11

19 U.S.C. § 482 8

21 U.S.C. §§ 841 (a)(1), 846, 952, 963 5

§ 955 17n

28 U.S.C. § 1254(1) 2

Anti-Smuggling Act (Act of August 5, 1935, as amended, 49 Stat. 517; 19 U.S.C. 1701, 1703-1711) 5

Convention on the High Seas, opened for signature, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962) 12, 13n, 17n

Article 6 3

Article 22 4, 16

Code of Federal Regulations, Title 19 § 162.3 5, 8n, 11n, 13n

MISCELLANEOUS.

Brin, The Fourth Amendment Adrift: Search and Seizure on the High Seas, 26 Loyola L. Rev. 1017 (1980) 10n

Coast Guard Drug Interdiction Hearings Before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 95 Cong., 2d Sess. 17n, 18n

Ficken, The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U. Miami L. Rev. 700 (1975) 10n

Fourth Amendment Afloat: Customs Searches, Drug Smuggling and the Balancing Test in the Fifth Circuit, 68 Ga. L. J. 1035 (Apr. 1980) 10n

High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea, 93 Harv. L. Rev. 725 (1980) 10n

Jessup, The United Nations Conference on the Law of the Sea, 59 Colum. L. Rev. 234 (1959) 17

Smith, Search and Seizure of Foreign Vessels in International Waters — Adrift with the Fourth Amendment, 5 Suffolk Trans. L. J. 141 (1980) 10n

Smoke on the Water: Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone, 13 N.Y. U.J. Int'l L. and Pol. 249 (Fall, 1980) 10n

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DAVID KEITH HENSEL,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, David Keith Hensel, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on January 25, 1983. That decision affirmed the judgment of the United States District Court for the District of Maine entered on July 16, 1981.

Opinions Below.[1]

The opinion of the United States District Court for the District of Maine, denying petitioner's motion to suppress, is reported at 509 F.Supp. 1364 (D. Me. 1981) and is set forth at page 1a in the appendix. The opinion of the United States Court of Appeals for the First Circuit affirming the denial of the motion to suppress and the judgment against petitioner is reported at 699 F.2d 18 (1st Cir. 1983) and is set forth at page 27a in the appendix.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on January 25, 1983. A timely petition for rehearing was filed, which was denied on February 28, 1983, and this petition for certiorari was filed within sixty days of that date. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes, Treaties and Regulations Involved.

UNITED STATES CONSTITUTION.
AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1]Petitioner was one of seven co-defendants who appealed to the Court of Appeals. The others were Gerald Wayne Case, Larry Ronald Duke, Robert Curtis Hubbard, Charles Thad Standley, John Jacob Wells and Creig Lee Dill.

UNITED STATES CODE TITLE 14.

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necesary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

CONVENTION ON THE HIGH SEAS.

Article 6

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive

jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

. . . . . .

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(*a*) That the ship is engaged in piracy; or

(*b*) That the ship is engaged in the slave trade; or

(*c*) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (*a*), (*b*) and (*c*) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

CODE OF FEDERAL REGULATIONS
TITLE 19.

§ 162.3. Boarding and search of vessels.

(a) *General authority.* A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:

(1) Any vessel at any place in the United States or within the Customs waters of the United States;

(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States; or

(3) Any vessel within a Customs-enforcement area designated such under the provisions of the Anti-Smuggling Act (Act of August 5, 1935, as amended, 49 Stat. 517; 19 U.S.C. 1701, 1703-1711), but Customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign government, or in the absence of a special arrangement with the foreign government concerned.

Statement of the Case.

The petitioner was indicted on June 12, 1980, for conspiracy to possess with intent to sell and import marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846, 952 and 963. The marijuana and other items of evidence had been seized from a Honduran vessel, the *Patricia*, on which the petitioner was the captain on May 31, 1980. Petitioner moved to suppress all items seized from the vessel, and the district court denied the motion.

The case was tried to a jury, which returned a verdict of guilty on May 15, 1981. On July 16, 1981, the petitioner was sentenced to a term of imprisonment for five years and a $15,000 fine.

Petitioner appealed to the Court of Appeals for the First Circuit, which affirmed the denial of the motion to suppress and the judgment against the petitioner on January 25, 1983. Petitioner filed a timely petition for rehearing, which was denied on February 28, 1983.

The search of the *Patricia* was the result of an air-sea chase which began around mid-day on May 30, 1980. The initial boarding by Canadian officers was nearly twenty-four hours later and American agents boarded the ship almost immediately thereafter. Such facts as the Government relied upon to establish probable cause for the boarding, other than the *Patricia's* continuing refusal to stop, were apparent within a brief period after the initial pursuit began, and there was no evidence of exigent circumstances making it impossible to obtain a warrant.

The U.S. Coast Guard had initiated the search, the Americans asked the Canadians to become involved, an American Drug Enforcement Administration (DEA) agent who was investigating a suspected off-loading site in Maine urged the Canadians to board the ship, the Coast Guard ship showed firepower and provided back-up assistance during the initial Canadian boarding, the Americans provided interpreters to interview the Spanish-speaking crew and a Coast Guard officer boarded the *Patricia* to search for evidence to transmit to the DEA to assist in its attempt to raid the suspected off-loading site. As a result of these and other factors the district court held that the boarding and search of petitioner's vessel were a product of a joint venture between United States and Canadian law enforcement agents. The Court of Appeals found no error in the ruling of the district court and assumed that United States participation in the search had been sufficient to trigger application of the exclusionary rule. 699 F.2d at 25.[2]

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[2] The question is, therefore, not at issue in connection with this petition for certiorari.

The air-sea chase which eventually led to the boarding had begun at a point ninety miles off the coast of the United States. The *Patricia* passed no closer than 13.5 miles to the coast of Canada,[3] and the boarding was eventually made in international waters southeast of Nova Scotia.

At the time the *Patricia* was boarded the ship was flying a Honduran flag and carried papers documenting the fact that it was registered in Honduras. No consent was obtained either from petitioner or Honduras for the boarding.

Reasons for Granting the Writ.

I. The Decision of the Court of Appeals Below is in Conflict with the Applicable Decisions of the Supreme Court.

A. *The Court of Appeals Misinterpreted this Court's Decision in* United States *v.* Ramsey, *431 U.S. 606 (1977), When it Sustained a Warrantless Search on International Waters for Which There was No Legal Authority.*

Petitioner argued below that the search of his foreign-registered vessel on international waters was unreasonable under the Fourth Amendment because there was no legal authority from any source to justify the boarding and search of the ship. He contended that there was no authority under international law, Canadian law or United States law, specifically 14 U.S.C. § 89(a).[4] Petitioner relied upon the analysis employed by this

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[3] The territorial sea of Canada extends twelve miles from the coast.

[4] The Court of Appeals assumed there was no authority under Canadian law, 699 F.2d at 25, and that the search violated international law and, therefore, that there was no authority under § 89(a). 699 F.2d at 29.

Court in *United States* v. *Ramsey*, 431 U.S. 606 (1977), and argued that the absence of any legal authority compelled the conclusion that the search was unreasonable.[5]

The Court of Appeals held that the lack of statutory authority and the fact that the search violated administrative regulations did not require application of the exclusionary rule. 699 F.2d at 29.[6] The court mistakenly relied upon *United States* v. *Caceres*, 440 U.S. 741 (1979), which held only that the mere violation of administrative regulations which were not required by the Constitution or by statute would not compel application of the exclusionary rule. This case should have been analyzed pursuant to the principles set forth in *United States* v. *Ramsey*, *supra*, and *Miller* v. *United States*, 357 U.S. 301 (1958), rather than under *Caceres*.

In *Ramsey*, the question was the lawfulness of the inspection of incoming international mail. This Court treated the question of whether there was statutory authority for such an inspection as a threshold issue in the case, and found authority under 19 U.S.C. § 482.[7] After finding statutory authority for the search, the court held that it had been reasonable under the Fourth Amendment. Both the majority and dissenting opinions treated the existence of statutory authority as the

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[5] Petitioner's argument was based on the holding of the court in *United States* v. *Williams*, 617 F.2d 1063 (5th Cir. 1980) *(en banc)*. The First Circuit's failure to adopt that analysis has led to a serious conflict between the circuits, as is explained more fully *infra* at Section II A.

[6] Coast Guard officers are subject to Customs regulations when enforcing laws administered by the Customs Service. 14 U.S.C. §§ 89(b), 143. They are therefore subject to 19 C.F.R. § 162.3(a), which prohibits them from boarding foreign vessels on the high seas in the absence of an agreement with the flag state.

[7] The Government had argued that there were other sources of statutory authority for the search. Had the court not found authority under 19 U.S.C. § 482, it would have had to determine whether there was any other statutory basis for the search. 431 U.S. at 615 n.10.

decisive question in the case. The dissenting justices would have invalidated the search on the basis of their conclusion that there was no statutory authority for it. 431 U.S. at 632.

Earlier, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the Court had employed the same analysis. It asked first whether there was any statutory authority for the search in question, and then, when authority was found, turned to the constitutional question of whether the search was nonetheless valid.

This analysis is appropriate in search and seizure cases because of the well settled rule that actions taken by inferior governmental agents which raise serious constitutional questions will not be upheld unless they are at least warranted by specific legal authority granted by the President or Congress. Thus, in *Greene* v. *McElroy*, 360 U.S. 474 (1959), the Court reversed the revocation of a government contractor's security clearance because the procedures employed had not been authorized by the President or Congress. The Court declared:

> [E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them. *Id.* at 507.

The Court employed the same reasoning in *Hannah* v. *Larche*, 363 U.S. 420 (1960), where the issue was whether Congress had authorized the Civil Rights Commission to adopt certain procedures.

Serious constitutional issues are raised when a foreign ship is boarded on international waters without a warrant and without flag-state consent.[8] First, warrantless searches are presumptively invalid under the Fourth Amendment, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). This principle should be applied to searches at sea, particularly where, as here, there is ample time to obtain a warrant before boarding.[9] A second issue is whether probable cause is required to stop and board a vessel, or whether "reasonable suspicion" that criminal activity is afoot will suffice.[10] A third issue is whether the Coast Guard may randomly stop ships on the high seas, or whether such boardings would be unconstitu-

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[8] These cases have provoked a storm of controversy in the law journals. *See, e.g.*, High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea, 93 Harv. L. Rev. 725 (1980) (hereafter, "Harv. Note"); Brin, The Fourth Amendment Adrift: Search and Seizure on the High Seas, 26 Loyola L. Rev. 1017 (1980); Ficken, The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law, 29 U. Miami L. Rev. 700 (1975); Smith, Search and Seizure of Foreign Vessels in International Waters — Adrift with the Fourth Amendment, 5 Suffolk Trans. L. J. 141 (1980); Smoke on the Water: Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone, 13 N.Y. U. J. Int'l. L. and Pol. 249 (Fall, 1980); Fourth Amendment Afloat: Customs Searches, Drug Smuggling and the Balancing Test in the Fifth Circuit, 68 Ga. L. J. 1035 (Apr. 1980).

[9] *See*, Harv. Note, *supra* at 727-731. If the Court grants the petition for certiorari and holds that evidence seized during the search of petitioner's ship must be suppressed because the search was not authorized by 14 U.S.C. § 89(a), it will be unnecessary to reach the issue of whether the Fourth Amendment precludes such searches without a warrant. However, if the Court finds that there was legal authority for the search, then petitioner requests the Court to consider whether a warrant was required.

[10] The First Circuit has held that only "reasonable suspicion" is required. *United States* v. *Green*, 671 F.2d 461 (1st Cir. 1982). The lower courts in this case found that probable cause existed, a conclusion which petitioner disputed.

tional under the rationale of *Delaware* v. *Prouse*, 440 U.S. 648 (1979).[11] The list of potentially troublesome constitutional questions is lengthy and the resolution of these issues to date has provoked enormous confusion in the lower courts and disagreement among the commentators. In the face of these constitutional problems, the court below should have held that at a minimum statutory authority was required to validate the search.

United States v. *Caceres*, *supra*, which was relied upon by the Court of Appeals for its decision, only controls where a defendant's sole complaint is that an action violated agency regulations. This Court in *Caceres* repeatedly noted that the agency regulations in issue were not required either by the Constitution or any federal statute, and explicitly distinguished the case from *Miller* v. *United States*, *supra*, in which government agents had violated a statute. Thus, the Court of Appeals was plainly wrong when it concluded, citing *Caceres*, that: "The Supreme Court has held that lack of statutory authority and the contravention of a regulation do not automatically invoke the exclusionary rule." 699 F.2d at 29.

The evidence in this case should have been suppressed for the same reason the exclusionary rule was invoked in *Miller* v. *United States*, *supra*. There, agents had entered a residence without knocking or announcing their presence and purpose. The Court held that the entry was a violation of 18 U.S.C. § 3109, and that even though the search took place in the District of Columbia, application of the exclusionary rule was required in order to enforce the common law and congressional

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[11] Compare, *United States* v. *Piner*, 608 F.2d 358 (9th Cir. 1979), with *United States* v. *Hilton*, 619 F.2d 127, 132-133 (1st Cir. 1980). The boarding in this case was not a random stop. However, it did violate Customs regulations, 19 C.F.R. § 162.3(a), which raises a question of an unreasonable exercise of authority by officers in the field, one of the concerns the Court addressed in *Delaware* v. *Prouse*, *supra*.

purposes behind the statute.[12] Here, there was both an absence of domestic statutory authority for the search and a violation of international common law, as set forth in the Convention on the High Seas. This should be treated as equivalent to a violation of statutory norms which requires application of the exclusionary rule.

B. *The Court of Appeals Resurrected a Standing Requirement in the Litigation of Fourth Amendment Claims, Contrary to this Court's Ruling in* Rakas *v.* Illinois, *439 U.S. 128 (1978).*

The Court of Appeals held that petitioner was not entitled to invoke the exclusionary rule in this case, even assuming that the search violated international law, was not authorized by 14 U.S.C. § 89(a), and violated administrative regulations. The court held:

> A related way to reach the same conclusion is to say that Hensel lacks 'standing.' That is, Hensel is not entitled to invoke the exclusionary rule on his own behalf, for any violation of international law invaded not his rights but rather the rights of Honduras.

699 F.2d at 30.

In so ruling, the court below mistakenly required Hensel to establish "standing" to challenge an illegal search by demonstrating that the law under which the search was said to be illegal had been enacted for his benefit. This Court has explicitly abandoned any "standing" requirements for the litigation of Fourth Amendment claims on motions to suppress, and requires only that an individual demonstrate a legitimate expectation of privacy in the areas searched. *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *United States* v. *Salvucci*, 448 U.S. 83 (1980).

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[12] The outcome in *Miller* was not determined by the application of constitutional law. Indeed, the Fourth Amendment is not mentioned in the Court's decision.

The search in this case was of commercial premises, a merchant ship. The court should have analyzed the case in terms of whether petitioner, the admitted captain of the ship, had a legitimate expectation of privacy on board. An expectation of privacy in commercial premises is clearly reasonable as a general matter. *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978); *Donovan* v. *Dewey*, 452 U.S. 594 (1981). Petitioner's expectation of privacy on board a foreign merchant ship on international waters was also objectively reasonable, inasmuch as it was protected by international law, applicable federal regulations and the absence of any United States statute authorizing the search.[13]

The Court of Appeals, however, did not discuss whether petitioner could invoke the exclusionary rule in those terms. The court simply concluded that because petitioner's claim that the search was not authorized by 14 U.S.C. § 89(a) was based, in part, on a claim that the search violated international law, that he would have no "standing" to raise the issue.[14] This decision represents a complete departure from the line of authority established by this Court since *Rakas* v. *Illinois*, *supra*, and the Court should grant certiorari to reverse the lower court on this issue.

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[13] Article 6 of the Convention of the High Seas, *opened for signature*, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962) provides that the flag state has the exclusive right to exercise jurisdiction over a vessel on the high seas. As noted above, Customs regulations recognize this principle. 19 C.F.R. § 162.3(a). The existence of the regulations in this case is relevant to the reasonableness of petitioner's expectation of privacy. *Cf.*, *United States* v. *Caceres*, *supra* at 753. Petitioner's argument that 14 U.S.C. § 89(a) does not authorize a search of a foreign vessel on international waters without flag state consent is described more fully *infra* at Section II B.

[14] This conclusion is particularly anomalous given the fact that the Court of Appeals recognized that petitioner, as captain of the ship, would have "standing" to sue for damages based upon an illegal search. 699 F.2d at 30.

II. The Decision of the Court of Appeals Below Creates Conflicts in the Decisions of the Courts of Appeals.

A. *The Courts of Appeals, in Cases Involving Searches of Foreign Ships on the High Seas, are in Conflict as to Whether the Principles of* United States *v.* Ramsey, *supra, or* United States *v.* Caceres, *supra, Apply to the Need for Legal Authority for Such a Search.*

The holding of the Court of Appeals that the absence of any statutory or other authority for the search of petitioner's ship did not require suppression of the evidence and did not compel application of the exclusionary rule created a conflict in the decisions of the Courts of Appeals on this issue.[15] The conflict is sharpest between the First and Fifth Circuits. The latter has held that legal authority is required for United States officers to search a foreign vessel on the high seas, and that the absence of authority would render such a search unreasonable under the Fourth Amendment:

> The two part structure of the Supreme Court's analysis in *Ramsey* implies that a warrantless seizure or search in the complete absence of authority — a lawless government intrusion — is unconstitutional per se. If it were possible for an *unauthorized* seizure or search to be reasonable in a fourth amendment sense, then the presence or absence of authority would be merely a factor to be considered by the court in assessing reasonableness; instead, *Ramsey* poses the issue of authority as a threshold determination. In other words, if the government can

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[15] Petitioner has discussed *supra* in part I A his contention that the lower court was mistaken in its reading of *Caceres*.

> point to no authority for a challenged search or seizure, a court must conclude, without any further consideration, that the search or seizure was unconstitutional.

United States v. *Williams*, 617 F.2d 1063, 1074 (5th Cir. 1980) (*en banc*).

Williams was a marijuana smuggling case, in which a foreign ship had been boarded on the high seas by the Coast Guard. Thus, the First and Fifth Circuits are squarely in conflict on the need for authority for such a search. The Eleventh Circuit has adopted the same view as the Fifth. *United States* v. *Garcia*, 672 F.2d 1349, 1367 n.30 (11th Cir. 1982).

The decision of the court below is also in conflict with applicable law in the Ninth Circuit. In *United States* v. *Soto-Soto*, 598 F.2d 545 (9th Cir. 1979), the defendant's truck had been searched at the border by an FBI agent. He challenged the search on the ground that the agent was not authorized by law to make such a search, in contrast to Customs agents who are authorized to make border searches. The court held that the agent was not authorized and that therefore the search violated federal statutes and the evidence seized should have been suppressed. The court explicitly distinguished *United States* v. *Caceres*, *supra*, and held that it was not applicable to a situation where there was a violation of a federal statute. It held that the case should be analyzed under *Miller* v. *United States*, *supra*, as asserted by petitioner here.

The decision of the court below is thus in conflict with decisions of the Fifth, Ninth and Eleventh Circuits, and this Court should agree to hear this case to resolve the conflict.

B. *The Courts of Appeals are in Conflict as to Whether Title 14 U.S.C. § 89(a) Provides Authority for the Search of a Foreign Vessel on International Waters without Flag State Consent.*

The court below held that 14 U.S.C. § 89(a) provided no authority for searches of foreign vessels in violation of international law, although it ultimately ruled, in effect, that no such authority was required. 699 F.2d at 27. Ironically, the Fifth Circuit has held that such authority is required, but that § 89(a) provides it. *United States* v. *Williams*, *supra*; *United States* v. *Postal*, 589 F.2d 862 (5th Cir. 1979); *United States* v. *Cadena*, 585 F.2d 1252 (5th Cir. 1978). The two circuits are thus in direct conflict with regard to this extremely important question of the statutory authority of the United States Coast Guard.

The question of the meaning of § 89(a), which is at the bottom of the conflict, is extremely significant because it involves, under the applicable principles of statutory construction, consideration of international law concerns. *See*, *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *Weinberger* v. *Rossi*, 456 U.S. 25 (1982). Petitioner argues that an interpretation of § 89(a) that authorizes the Coast Guard to board foreign vessels on international waters without flag state consent would violate accepted international law principles.[16] Article 22 of the Convention on the High Seas, *supra*, recognizes only very narrow exceptions to the principle that the flag state has the exclusive right to exercise jurisdiction over a vessel on the

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[16] Petitioner also contends that the legislative history of § 89(a) demonstrates no congressional intent to authorize searches of foreign vessels on the high seas in violation of international law. This argument was accepted by the court below. 699 F.2d at 27.

high seas.[17] None of the recognized exceptions allow interference with foreign ships for the purpose of interdicting suspected drug smugglers.

Resolution of this issue by this Court is particularly urgent because there is not only a conflict between the Courts of Appeals on this issue, but also apparently between the Justice Department and other executive departments. All of the spokespersons from executive departments which appeared before Congress to testify concerning legislation in this area have officially taken the position that the Coast Guard cannot board foreign vessels on the high seas without flag state permission.[18]

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[17] The Convention on the High Seas did not attempt to make new law, but to set forth and clarify previously well-accepted principles which had constituted an international common law of the sea. *United States* v. *Williams*, *supra*, at 1090; *see*, generally, Jessup, The United Nations Conference on the Law of the Sea, 59 Colum. L. Rev. 234 (1959).

[18] At the hearings before the House Committee on the bill which eventually became 21 U.S.C. § 955, the following witnesses agreed that international law precluded such boardings: Rear Admiral Norman C. Venzke, Chief, Office of Operation, U.S. Coast Guard; W. Gordon Fink, Assistant Administrator for Intelligence, Drug Enforcement Administration; John D. Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs; Stuart P. Seidel, Assistant Chief Counsel, Enforcement and Operations, U.S. Customs Service. Coast Guard Drug Interdiction Hearings Before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 95 Cong., 2d Sess., pp. 108, 111, 112, 170, 212-214, 216, 221.

The State Department representative, Mr. Negroponte, specifically rejected any drug trafficking exception to the international law principle of non-interference with ships of another nation:

> If I understand you correctly, what you are suggesting is elevating narcotics trafficking to the kind of offense of let's say piracy or something of that nature.
>
> I think that our department's position up until now has been not to encourage seeking that kind of change in international law.
>
> This is a very difficult problem, Mr. Treen. This very subcommittee's name is called Coast Guard and Navigation, and it is a question

Yet, prosecutors from the Department of Justice continue to assert in individual criminal cases, as here, that § 89(a) has given the Coast Guard this power.

This Court should grant certiorari in this case both for the purpose of resolving a conflict among the Courts of Appeals and for the purpose of settling a disputed question of statutory interpretation, confusion over which could have grave consequences for the United States under international law.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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of balancing two important sets of national priorities, one which is that of stamping out illicit drug traffic and the other doing what we think is reasonable in terms of protecting navigational freedoms. We have a great deal of confidence in our own law enforcement authorities, and the kind of judgments that they use in exercising their jurisdiction against others, but there are other countries who could use these kinds of prohibitions as pretext for just downright harrassment. Coast Guard Drug Interdiction: Hearings, *supra* at 216.

Appendix.

Table of Contents.

Opinion, United States District Court, D. Maine, March 20, 1981 1a

Opinion, United States Court of Appeals, First Circuit, January 25, 1983 27a

Judgment 81a

UNITED STATES of America

v.

David Keith HENSEL et al.

Crim. No. 80-00003C P.

United States District Court,
D. Maine.

March 20, 1981.

In a drug prosecution and on motions to suppress evidence and statements, after evidentiary hearing, the District Court, Gignoux, C.J., held that: (1) implicit in holding that participation of United States Coast Guard was sufficient to trigger application of Fourth Amendment was conclusion that Canadians were acting "under the aegis of" the Americans, and thus there could be no improper delegation of authority conferred upon Coast Guard by statute, and statutory authority of Coast Guard could be invoked to authorize actions of the Canadians; (2) circumstances of record established probable cause for search and seizure of vessel; (3) warrant requirement of Fourth Amendment does not apply to maritime searches and seizures; and (4) consumption of alcohol by defendant did not require finding that he lacked capacity to think clearly and rationally or finding that statements which he made to Canadian agents were involuntarily made, but, rather, on record, Government carried its burden of establishing any preponderance of evidence that his statements were voluntary.

Motions denied.

1. Searches and Seizures — 7(29)

To contest search and seizure on Fourth Amendment grounds, defendant has burden of establishing that he had

legitimate and reasonable expectation of privacy in premises searched or property seized. U.S.C.A. Const. Amend. 4.

2. Criminal Law — 394.2(2, 3)

Fourth Amendment exclusionary rule does not apply to arrests and searches made by foreign authorities on their home territory and in enforcement of foreign law even if persons arrested and from whom evidence is seized are American citizens, but there are exceptions such as where circumstances shock judicial conscience or where American law enforcement officials participated in foreign search or if foreign authorities actually conducting search were acting as agents for American counterparts. U.S.C.A.Const. Amend. 4.

3. Shipping — 9

Use of weapons to effectuate stop of vessel did not constitute excessive force where vessel did not stop until shots had been fired.

4. Searches and Seizures — 7(1)

Although question was close, extent of cooperation between United States Coast Guard and Canadian officials in pursuit, boarding and search of vessel required conclusion that joint venture existed, compelling application of the Fourth Amendment, the record disclosing that the United States Coast Guard instigated, coordinated and closely collaborated with the Canadians in effectuating seizure and search. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures — 3.9

In determining whether boarding and search of vessel violated Fourth Amendment rights, court would first inquire whether Coast Guard had statutory authority to seize and search the vessel and then whether search and seizure, although authorized, violated Fourth Amendment. 14 U.S.C.A. § 89(a); U.S.C.A.Const. Amend. 4.

6. Search and Seizures — 7(1)

Implicit in holding that participation of United States Coast Guard was sufficient to trigger application of Fourth Amendment was conclusion that Canadians were acting "under the aegis of" the Americans, and thus there could be no improper delegation of authority conferred upon Coast Guard by statute, and statutory authority of Coast Guard could be invoked to authorize actions of the Canadians. 14 U.S.C.A. § 89(a); U.S.C.A.Const. Amend. 4.

7. Shipping — 9

Record showing that for several days crew of boat had seen vessel lying idly with no apparent purpose just outside United States waters with one white man and several black men on board and that two telephone numbers which white man requested to call were listed to suspected drug smugglers and check further revealed that vessel by same name was suspected of drug smuggling and no flag was flown until approach was made and vessel carried sophisticated electronic and radar equipment and fled although white man had reported that vessel was disabled and in need of assistance furnished probable cause for Coast Guard to believe that vessel was engaged in conspiracy to smuggle contraband into United States, and made it reasonable to seize and search vessel. 14 U.S.C.A. § 89(a); U.S.C.A.Const. Amend. 4.

8. Searches and Seizures — 7(10)

Warrant requirement of Fourth Amendment does not apply to maritime searches and seizures. 14 U.S.C.A. § 89(a); U.S.C.A.Const. Amend. 4.

9. Criminal Law — 412.2(3)

Where american officers actively participate in arrest and interrogation of defendant by foreign officials, *Miranda* warn-

ings must be administered prior to questioning, but where United States agents do not actively participate in arrest and interrogation, failure to give *Miranda* warnings does not invoke Fifth Amendment exclusionary rule. U.S.C.A.Const. Amend. 5.

10. Criminal Law — 414

Consumption of alcohol by defendant did not require finding that he lacked capacity to think clearly and rationally or finding that statements which he made to Canadian agents were involuntarily made, but, rather, on record, Government carried its burden of establishing by preponderance of evidence that his statements were product of rational intellect and free will and were therefore voluntary. U.S.C.A.Const. Amend. 5.

Thomas E. Delahanty, II, U. S. Atty., Margaret D. McGaughey, Asst. U. S. Atty., Portland, Me., for plaintiff United States of America.

John P. Ward, Michael Avery, Boston, Mass., for defendant David K. Hensel.

Jack H. Simmons, Lewiston, Me., for defendant Gerald W. Case.

Marshall A. Stern, Bangor, Me., for defendant Craig L. Dill.

Theodore K. Hoch, Bath, Me., for defendant John T. Downing.

Edward T. M. Garland, Atlanta, Ga., Joseph M. Hochadel, Portland, Me., for defendant Larry R. Duke.

Peter J. Rubin, Portland, Me., for defendant Robert C. Hubbard.

Peter J. DeTroy, III, Mark G. Lavoie, Portland, Me., for defendant William Storey.

David C. Pomeroy, Portland, Me., for defendant Charles T. Standley.

William P. Hardy, Lewiston, Me., Mark J. Kadish, Atlanta, Ga., for defendant John J. Wells.

MEMORANDUM OF OPINION AND ORDER ON DEFENDANT HENSEL'S MOTIONS TO SUPPRESS

GIGNOUX, Chief Judge.

Nine defendants are charged in a one-count indictment with conspiracy to possess with intent to distribute and to import into the United States approximately 18.7 tons of marijuana, in violation of 21 U.S.C. §§ 846 and 963. Presently before the Court are defendant Hensel's motions to suppress evidence and statements pursuant to Fed.R.Crim.P. 12(b)(3) and 41.[1] An evidentiary hearing has been held, the issues have been comprehensively briefed and argued by counsel, and the following memorandum opinion contains the Court's findings of fact and conclusions of law as required by Fed.R.Crim.P. 12(e).

I

THE FACTS

A. *The Pursuit, Boarding and Search of the PATRICIA — Arrest of Defendant Hensel*

At approximately 10:50 a. m. on May 31, 1980, the M/V PATRICIA, a 65-foot vessel, later determined to be of Honduran registry, was stopped by the Royal Canadian Mounted Police (RCMP) after a 24-hour high seas chase. On board were defendant David Keith Hensel, who is an American citizen, eight Colombian nationals, and 18.7 tons of marijuana.

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[1] Similar motions to suppress filed by the other eight defendants are the subject of a separate opinion.

The PATRICIA had first come to the attention of the United States Coast Guard (USCG) at approximately 10:30 a. m. on May 30 when the USCG Operations Center in Boston (CG Command) received a radio message from the J. BRADLEY O'HARA, a Rockland, Maine, fishing vessel, reporting a disabled vessel in the Gulf of Maine. On May 28, the crew of the O'HARA boat had first seen the PATRICIA in the Sewell Ridge area approximately 90 miles southeast of Rockland. The PATRICIA was not a familiar vessel in that area and did not appear to be fishing. On May 30, the PATRICIA approached the O'HARA boat and requested permission to use its radio. The captain, later identified as defendant Hensel, explained that his generator was not working, his radio batteries were dead, and he wished to contact a "partner" in the area with whom he planned to go to Canada to be rigged for fishing. Hensel was told that he could use the radio in half an hour, after the O'HARA's fishing nets were hauled back. During that half hour the captain of the O'HARA boat became suspicious and informed the USCG that the PATRICIA was disabled. When the PATRICIA again drew alongside after the nets were hauled in, the O'HARA captain told Hensel he could not come aboard and informed Hensel that he had notified the Coast Guard. Hensel requested that the call be canceled and, upon learning that the Coast Guard was already on the way, gave the mate of the O'HARA boat three telephone numbers and asked him to call them. Instead of placing the calls, the captain of the O'HARA boat relayed them to the Coast Guard.

The CG Command dispatched a Coast Guard aircraft and the USCG Cutter RELIANCE to the scene with instructions to locate the disabled vessel in the Sewell Ridge area. The aircraft, piloted by Lt. Wayne Luginbuhl, arrived at Sewell Ridge at approximately 11:25 a. m. The PATRICIA was lying dead in the water. Lt. Luginbuhl's attempts to communicate

with the PATRICIA by radio were unsuccessful. He made several low passes over the vessel and reported that it did not appear to be fishing vessel, that the only identification was the name PATRICIA on the bridgewing, and that it was not flying the flag of any country. He requested a check of the El Paso Information Center (EPIC) computer. After the Coast Guard plane circled the PATRICIA several times, to Lt. Luginbuhl's surprise, the vessel got underway and proceeded in a northeasterly direction at five to ten knots per hour.

Shortly thereafter, the CG Command notified Lt. Luginbuhl that the EPIC check had revealed that a vessel named PATRICIA was suspected of drug smuggling.[2] He was directed to track the PATRICIA until the RELIANCE could reach her. Following standard operating procedure, Lt. Kent Morris of the CG Command then notified Special Agent Edward Drinan of the Drug Enforcement Administration (DEA) in Maine, and alerted the Canadian Coast Guard of the possibility the PATRICIA was heading for Nova Scotia.

Lt. Luginbuhl maintained surveillance as the PATRICIA headed generally northeast toward Nova Scotia. He attempted, without success, to communicate with the vessel by radio and by smoke float. Finally, he dropped a message block ordering the vessel to reverse course for rendezvous with the RELIANCE.[3] At the request of the CG Command, the Cana-

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[2] It was learned afterward that the EPIC report related to another vessel of similar description, also named PATRICIA, and not to the vessel in Sewell Ridge on May 30.

[3] The dropped message read:

> As a stateless vessel you are in possible violation of United States laws and we as Federal Law Enforcement agents order you to reverse your heading to 253° magnetic for rondevous [*sic*] and boarding by Coast Guard Cutter Reliance.
>
> Per order of Commander
> First Coast Guard District

dian Coast Guard dispatched to the scene a Buffalo aircraft, which relieved Lt. Luginbuhl at approximately 3:00 p. m. The Canadian plane also attempted to communicate with the PATRICIA by dropping a second message block, which was not retrieved, and then tried unsuccessfully to divert the vessel's course with smoke floats. The PATRICIA continued its way toward Nova Scotia at a speed of eight knots. At approximately 7:00 p. m., another USCG plane relieved the Canadian Buffalo. Efforts to communicate with the Patricia and to divert it from its course were again unsuccessful.

In the meantime, the Canadian Coast Guard had contacted the Canadian Department of Fisheries to arrange for the use of two vessels, should they be needed, and Cpl. Robert Janes of the RCMP Halifax Drug Section was apprised of the possibility that the PATRICIA was headed toward Nova Scotia, with contraband on board. Direct communication between Cpl. Janes and Lt. Morris was established and maintained throughout the night of May 30 and the early morning hours of May 31.

By 7:00 p. m. it became evident that the PATRICIA's course and speed would bring it into Canadian waters before the RELIANCE could intercept it. Its destination appeared to be the southern tip of Nova Scotia. Consequently, Cpl. Janes contacted S/Sgt. Brogan of the RCMP Yarmouth detachment to set up a communication network in Yarmouth. Sgt. Brogan set up RCMP surveillance at 50-mile intervals along the Nova Scotia coast, at Liverpool, Barrington and Shelburne, and prepared to relay information from the Canadian Coast Guard and Fisheries Department to the surveilling agents. Cpl. Janes also advised Lt. Morris of the RCMP's intent to stop and board the PATRICIA if it came within 21 miles of the Canadian shore. At approximately 8:00 p. m., S/Sgt. Brogan dispatched the Canadian Fisheries vessel LOUISBOURG from Yarmouth to intercept the PATRICIA. Five RCMP agents accompanied the crew.

Lt. Morris was also in communication with DEA Agent Drinan during the night of May 30-31. DEA investigation and an EPIC check had revealed that two of the telephone numbers the PATRICIA had asked the O'HARA mate to call were for exchanges in Florida listed under the names of Timothy Carey and Harvey Watkins, both of whom were suspected of conspiring to import marijuana into South Carolina in a vessel named HUH?.[4] The third telephone number was for an exchange in Cobbtown, Georgia, but the identity of the subscriber could not be identified at that time.[5] When this information was passed on to Drinan, he informed Lt. Morris that the DEA was maintaining surveillance of a suspected marijuana offloading site on the Maine coast and that vehicles seen at the site were from Florida and Georgia. Drinan asked that he be kept informed of any information the Coast Guard obtained regarding the PATRICIA. At various points during the night Drinan was also in communication with Cpl. Janes and S/Sgt. Brogan of the RCMP, whom he had informed of DEA's Maine investigation. Drinan encouraged the Canadians to seize the PATRICIA if the vessel entered Canadian waters.

Meanwhile, USCG aircraft continued surveillance of the PATRICIA. They dropped other smoke bombs without success and observed that the PATRICIA was operating without navigational lights. At one point during the evening, one of the pilots plotted the PATRICIA at 13.5 miles from the Nova Scotia coast. Other plottings showed the PATRICIA to be steering an erratic course which was within the 21-mile Canadian limit for substantial periods of time.

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[4] A coconspirator in that investigation had been one Wayne Dennis Hensel, who was later determined to be the brother of defendant Hensel.

[5] It was subsequently learned that several digits in the Georgia telephone number had been transposed.

The LOUISBOURG made radar contact with the PATRICIA at approximately 3:00 a. m. and visually sighted the vessel at 5:11 a. m. The RELIANCE arrived on the scene at 6:00 a. m. Both vessels attempted to communicate with the PATRICIA by radio, flag hoists, flashing lights and loud hailer. The PATRICIA did not respond and headed further east into the Atlantic Ocean. The operations officer on the RELIANCE, Lt. Dennis Schenk, reported that the PATRICIA was badly rusted and was riding below the waterline. No nets or fishing gear were seen above the deck. The name PATRICIA appeared on the bridgewing, but no home port was displayed, and no identifying numbers were visible on the hull. The deck was poorly maintained with tire marks appearing on the starboard side. Two black crew members were seen on deck, and substantial electronic and radar equipment and antennas could be seen in or on the pilothouse. Lt. Schenk also noted that the PATRICIA had raised and was flying an Honduran flag.

When the Honduran flag was observed, the RELIANCE, upon instructions from the CG Command, informed the LOUISBOURG that, pursuant to the Coast Guard Commandant's Instruction 16244.1, the Americans could not board the PATRICIA without first obtaining permission from the United States Department of State and Honduran government, via a statement of "no objection" from the Commandant. The RELIANCE informed the Canadians that it would take 24 to 48 hours to obtain such permission. This, and other information about the PATRICIA, was relayed to DEA Agent Drinan, and at 8:51 a. m. the RELIANCE received a "for information only" teletype from the CG Command advising that DEA agents were surveilling a suspected marijuana offloading site at Turkey Cove, Tenant's Harbor, Maine; that they were prepared to close in and arrest those on the property; and that they were interested in ascertaining the identities of those on

board the PATRICIA as soon as possible. The Canadians had also been apprised of the DEA's interest in the vessel.

The RELIANCE passed the information regarding the surveillance in Maine on to the LOUISBOURG, but informed the Canadians that the RELIANCE could not take action to stop and board the PATRICIA until permission was obtained from the Honduran government. Cpl. Janes, upon hearing that the RELIANCE would have to wait 24 hours or more before permission to board could be obtained, consulted his superior and was instructed that if the PATRICIA was then or had been within Canada's 21-mile limit, the Canadians should board the vessel for suspected violation of Canadian customs laws.

At 9:01 a. m., the LOUISBOURG informed the RELIANCE that if the RELIANCE were not going to take action, the LOUISBOURG would. At 9:40 a. m., the LOUISBOURG reported that it had received permission to board the PATRICIA, but if circumstances became dangerous, it was to cancel the boarding. The Canadians sought permission to land a helicopter on board the RELIANCE if it was necessary to bring reinforcements, and asked the RELIANCE to show its fire power. The RELIANCE agreed, displaying a manned three-inch gun at the bow, and stated that it would stand by, and, if need be, would protect the LOUISBOURG in accordance with the Coast Guard's "use of force" policy.

The LOUISBOURG circled the PATRICIA at high speed in an attempt to stop her with its wake action. When this method failed, the RCMP Officers displayed 12-gauge shotguns and fired a warning shot across the PATRICIA's bow. Two more shots were fired into the wheelhouse, and at 9:50 a. m. the PATRICIA came to a halt, approximately 65 miles off the southeast coast of Nova Scotia.

An armed party of RCMP, led by Cpl. Donald McRae, boarded the PATRICIA. The RCMP ordered the crew of eight Colombians and one American to the stern of the boat.

Cpl. McRae went to the wheelhouse, where he discovered documents indicating that in 1976 the PATRICIA had been registered in Honduras to a Colombian national. Charts and navigational aids were also found lying about in the wheelhouse. In the first cabin behind the wheelhouse on the port side, later determined to be occupied by Hensel, radios and other communications equipment were visible through the door, which was bolted open. After loosening the bolts on two closed hatches on the bow, Cpl. McRae discovered over 600 burlap bags containing a total of 18.7 tons of marijuana. Hensel and the Colombians were then placed under arrest for importation of a narcotic, and read the "primary warning" which is routinely given by Canadian law enforcement agents to criminal suspects, as follows:

> You need not say anything. You have nothing to hope from any promise or favor, and nothing to fear from any threat, whether or not you say anything, and anything you do say may be used as evidence.

Approximately one-half hour later, when the PATRICIA and its crew were completely under RCMP control, Cpl. McRae radioed the LOUISBOURG to request that the RELIANCE send over Spanish speaking interpreters, if available, to interview the eight Colombians, who spoke no English. The RELIANCE responded by dispatching two interpreters. Lt. Schenk also boarded the PATRICIA to obtain information on the documentation and equipment on the vessel and to ascertain for transmittal to the DEA the identities of those arrested. Lt. Schenk stayed on board about an hour. He examined documents, charts and electronic equipment in the pilothouse and in Hensel's cabin, and obtained the names, addresses and dates of birth of the crew. Neither Lt. Schenk nor the RCMP seized any evidence from the PATRICIA at this time.

After the Americans had returned to the RELIANCE, the Canadians secured the PATRICIA for towing to a Canadian Fisheries' facility in Shelburne, Nova Scotia.

B. *The Interrogation of Defendant Hensel*

RCMP Cst. William Parker stayed with Hensel during the trip to Shelburne. During that time, Hensel provided Parker with pedigree information such as his address, which he claimed was in Connecticut. Hensel stated that he did not know who the owner of the PATRICIA was. Other than saying that the vessel was headed to Africa, he would not discuss the subject of the PATRICIA's cargo, or of the voyage. The LOUISBOURG, with the PATRICIA in tow, arrived in Shelburne at about 8:00 p. m. The marijuana bales, radio equipment and documents were unloaded from the vessel and secured in RCMP storage facilities.

Hensel was taken to a nearby motel, where he was provided dinner and a shower. Cst. Parker and another RCMP officer accompanied Hensel to his room, and again gave him the police caution which he had been given on board the PATRICIA. Hensel indicated he understood it. He then admitted that Connecticut was not his proper address, and that his true residence was Key West, Florida. At one point he stated that he wanted a lawyer and was given the yellow pages of a telephone book to look for one. The subject was dropped. The conversation lasted about one hour.

At 11:00 a. m. the next morning, June 1, Hensel was taken to the Shelburne RCMP headquarters for booking. During the morning, RCMP Cst. Gary Grant and another Canadian official searched the Nova Scotia coastline, from Shelburne to Liverpool, by helicopter in search of any offloading site. A search of two hours did not reveal such a site.

At 1:00 p. m., Hensel was interviewed at RCMP headquarters by Csts. Grant and Wayne Noonan. Before any

questions were asked, the agents recited the standard RCMP "secondary warning on purged statement," as follows:

> I wish to give you the following warning. You must clearly understand that anything said to you previously should not influence you or make you feel compelled to say anything at this time. Whatever you felt influenced or compelled you to say earlier, you are not now obligated to say anything further, but whatever you do say will be taken down in writing and may be given in evidence. You understand what had been said to you?

Hensel indicated he understood.

Initially, questioning focused on Hensel's background, his father's suicide, his girlfriend, his knowledge of boating and the sea. At 2:00 p. m. Hensel asked how he could contact an attorney. He was advised that "you are not in the United States now, son" and that at that time an attorney would not be supplied.

Grant and Noonan employed a "good guy-bad guy" technique for interrogation. Grant expressed sympathy for the defendant, while Noonan indicated that he did not care what happened to defendant and pointed out that there was a seven-year mandatory penalty in Canada for smuggling drugs. The interview ended at 4:45 p. m.

Shortly thereafter, Hensel indicated he wished to talk to Cst. Parker. At 6:00 p. m., Parker and another RCMP officer brought Hensel a supper of chicken and french fried potatoes. He drank three beers with the meal. Sometime thereafter Hensel stated that he had been at sea for 21 days and the food supply was nearly gone; that during the pursuit the Colombian crew wanted to stop and leave the vessel; that the vessel "HUH?", which he claimed to own, was seized in South Carolina, and his brother had been involved; that the contents of the PATRICIA had not been destined for Canada but for

"the States"; and that he was to have been paid $400,000 for the delivery, the crew members to receive 3500 pesos each.

The results of this discussion were passed on to Cpl. Janes and to DEA Agent Drinan in Portland. Hensel then asked if he could use the telephone. In the officers' presence, he called one Howie Fuguary in Florida, told him where he was, and requested assistance. He also asked Fuguary to telephone a person named Judy to let her know where he was.

The following day, June 2, Hensel was transported from Shelburne to Halifax. Because the PATRICIA had not been seen within 12 miles of the Nova Scotia coast, the Canadian officials concluded that jurisdiction to prosecute Hensel under Canadian law could not be established. He was therefore informed by the RCMP that no charges were to be prosecuted against him in Canada.

On June 3, at an informal immigration hearing at which Hensel was represented by counsel, Hensel waived any challenge to expulsion from Canada and was put on board a nonstop flight to Boston, accompanied by two RCMP officers.[6]

Drinan was waiting at Logan Airport in East Boston when the airplane arrived on the afternoon of June 3. After the RCMP agents identified Hensel, Drinan asked Hensel if he would accompany him to his office in Portland for a discussion with the United States Attorney. He informed Hensel that he need not agree to the request. Hensel asked what would happen if he refused. Drinan responded that he was not sure. Hensel then asked permission to call his attorney.

At a nearby Customs office, and in Drinan's presence, Hensel telephoned an attorney in Boston to inform him of Drinan's request and to ask for his advice. He also instructed the attorney to telephone a woman attorney in Pennsylvania, "who would know who to call and know what to do." Hensel

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[6]The eight Colombians were deported to Colombia.

then handed the telephone to Drinan. After a conversation with the attorney, and at his suggestion, Drinan placed Hensel under arrest. He then informed Hensel of his *Miranda* rights. A short time later, Hensel was brought before a United States magistrate in Boston and charged with conspiracy to import marijuana.

II

THE LAW

Defendant Hensel seeks to suppress all evidence seized by the Canadian authorities from the PATRICIA, together with the fruits of said search and any reference to such evidence, on the ground that the boarding and search of the PATRICIA violated his Fourth Amendment rights. In addition, defendant seeks suppression of the statements and admissions made by him while in Canadian custody, because obtained in violation of his Fifth Amendment rights. The Court will treat separately each of these contentions.

A. *The Boarding and Search of the PATRICIA*

Defendant contends that the Canadian authorities boarded and searched the PATRICIA "at the request or instruction and with the knowledge and/or participation of" the United States Coast Guard; that the Fourth Amendment to the United States Constitution is therefore applicable; and that the boarding and search violated defendant's Fourth Amendment rights because made without legal authority and not based on either reasonable suspicion or probable cause. The government argues that the defendant is foreclosed from challenging the validity of the boarding and search of the PATRICIA because he had no reasonable expectation of privacy in the vessel or its cargo; that the Canadian officers who boarded and searched

the PATRICIA were acting independently of the United States Coast Guard and therefore the Fourth Amendment does not apply; and that, in any event, defendant's Fourth Amendment rights were not violated because the boarding and search were supported by adequate legal authority and justified both by reasonable suspicion and by probable cause.

Although defendant probably had no reasonable expectation of privacy in the PATRICIA or its cargo, the Court assumes for the purpose of this opinion that he may raise a Fourth Amendment challenge to the boarding and search of the vessel. The Court also concludes that the participation of the United States Coast Guard in the seizure and search was sufficiently substantial so that the Fourth Amendment is applicable. The Court holds, however, that the boarding and search of the PATRICIA were supported by adequate legal authority and justified both by reasonable suspicion and by probable cause, and therefore did not violate any Fourth Amendment rights defendant may have had.

1. *The Defendant's Standing*

[1] In order to contest a search or seizure on Fourth Amendment grounds, a defendant has the burden of establishing that he had a legitimate and reasonable expectation of privacy in the premises searched or the property seized. *Rawlings v. Kentucky*, 448 U.S. 98, 104-105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 130, 131 n.1, 148-49, 99 S.Ct. 421, 423 n.1, 433, 58 L.Ed.2d 387 (1978). By his own admission, defendant did not own the PATRICIA or the marijuana seized from the vessel's hold. Nor did defendant claim that he had any property interest in the communications equipment, charts or documents discovered in the wheelhouse or in his cabin. Because vessels on the seas are commonly subject to stops by Coast Guard and Customs

officers for a variety of document and safety inspections, the government persuasively argues that defendant could have had little, if any, expectation of privacy in those parts of the PATRICIA, such as the wheelhouse, the holds and Hensel's exposed cabin, that would be in the plain view of one conducting such an inspection. There is substantial merit in this argument. *See United States v. Williams*, 617 F.2d 1063, 1075, 1084 (5th Cir. 1980) (en banc);[7] *United States v. Arra*, 630 F.2d 836, 841 n.6 (1st Cir. 1980). But since the Court concludes, *post*, that the search and seizure were valid, for the purposes of this opinion the Court will assume that defendant has standing to raise his present Fourth Amendment attack.

2. *The Applicability of the Fourth Amendment.*

[2,3] The Fourth Amendment exclusionary rule does not apply to arrests and searches made by foreign authorities on their home territory and in the enforcement of foreign law even if the persons arrested and from whom the evidence is seized are American citizens. *United States v. Rose*, 570 F.2d 1358, 1361-62 (9th Cir. 1978); *United States v. Marzano*, 537 F.2d 257, 269-71 (7th Cir. 1976); *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969); *Birdsell v. United States*, 346 F.2d 775, 782-83 (5th Cir.), *cert. denied*, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1965). To this general rule there are two exceptions. First, if the circumstances of the foreign search and seizure are so egregious that they "shock the judicial conscience," exclusion of the evidence may be re-

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[7] Although the en banc *Williams* court felt that the record in that case was insufficient to determine whether the defendant had some property interest in the vessel or the marijuana seized, it agreed with the panel's holding that a mere crew member could have no privacy interest in the holds of a cargo vessel. 617 F.2d at 1084.

quired. *See, e.g., United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974) (physical torture). No such extreme conduct is alleged here.[8]

"Second, if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked." *United States v. Morrow*, *supra* at 139; *United States v. Rose*, *supra* at 1362. The particular facts in each case must be examined to determine whether the American officials so substantially participated in the search and seizure as to convert it into a joint venture between the United States and the foreign officials, thereby triggering application of the Fourth Amendment. *United States v. Rose*, *supra*; *United States v. Morrow*, *supra*; *Stonehill v. United States*, *supra* at 743. *Cf. Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949); *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927).

[4] Although the question is close, the Court is persuaded that the extent of the cooperation between the United States Coast Guard and the Canadian officials in the pursuit, boarding and search of the PATRICIA requires the conclusion that a joint venture existed compelling application of the Fourth Amendment. The surveillance which led to the stop of the PATRICIA was initiated by the United States Coast Guard. It was at the request of the Americans that the Canadians became involved in the pursuit. DEA Agent Drinan urged the Canadians to board if the vessel entered Canadian waters. When it became apparent that the RELIANCE could not board the PATRICIA until the consent of the Honduran gov-

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[8] Defendant does not claim, nor could he, that the use of weapons to effectuate the stop constituted excessive force. *See United States v. Arra*, *supra* at 845 n.11.

ernment was obtained, the RELIANCE agreed to support a boarding by the LOUISBOURG by displaying its fire power and providing backup assistance if required. The RELIANCE disptached two interpreters to the PATRICIA to help the Canadians question the Spanish speaking crew. Lt. Schenk also went aboard the PATRICIA. He accompanied Canadian officers in a second search of the vessel; examined documents, electronics equipment and charts; and obtained the identities of the crew for submission to DEA Agent Drinan in Maine.

Clearly, this is not a case in which United States law enforcement officers were passively present at the scene of a search and seizure, *see United States v. Marzano*, *supra* at 270; not a situation in which United States officers merely furnished information to foreign officials, *see id.*; *United States v. Morrow*, *supra* at 140; and not an instance in which United States officers were aware of and shared the fruits of a contested foreign search but took no part in the actual operation, see *Stonehill v. United States*, *supra* at 746. In the instant case, the record discloses that the United States Coast Guard instigated, cocrdinated and closely collaborated with the Canadians in effectuating the seizure wand search of the PATRICIA. In short, the participation of the Americans was sufficiently substantial to permit defendant to invoke the protection of the Fourth Amendment. *Cf. Lustig v. United States*, *supra*; *Byars v. United States*, *supra*.

3. *The Constitutionality of the Boarding and Search*

[5-8] In determining whether the boarding and search of the PATRICIA violated defendant's Fourth Amendment rights, the Court employs the analysis developed by the Supreme Court in *United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 172, 52 L.Ed.2d 617 (1977), and subsequently utilized by the en

banc Fifth Circuit in *United States v. Williams, supra.*[9] The Court first inquires whether the Coast Guard had statutory authority to seize and search the PATRICIA. The Court then considers whether he seizure and search, although authorized, violated the Fourth Amendment.

(a) *Statutory Authority.* Section 89(a) of Title 14, U.S.C.A., authorizes the Coast Guard to

> make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

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[9] In assessing the validity of a Coast Guard search of a foreign vessel on the high seas, the *Williams* court explained the *Ramsey* two-part analysis as follows:

> The two-part structure of the Supreme Court's analysis in *Ramsey* implies that a warrantless seizure or search in the complete absence of authority — a lawless governmental intrusion — is unconstitutional per se. If it were possible for an *unauthorized* seizure or search to be reasonable in a fourth amendment sense, then the presence or absence of authority would be merely a factor to be considered by the court in assessing reasonableness; instead, *Ramsey* poses the issue of authority as a threshold determination. In other words, if the Government can point to no authority for a challenged search or seizure, a court must conclude, without any further consideration, that the search or seizure was unconstitutional. On the other hand, if it can be established that the search or seizure was authorized, the court must then determine whether the search or seizure, as authorized, was reasonable within the meaning of the fourth amendment.

617 F.2d at 1074.

14 U.S.C.A. § 89(a).

In *United States v. Williams, supra*, recently decided by the Fifth Circuit, the court held that Section 89(a) authorizes the Coast Guard to seize and search a foreign vessel in international waters if the Coast Guard first has a reasonable suspicion that those aboard the vessel are engaged in a conspiracy to smuggle contraband into the United States and that there is contraband in the hold of the vessel. In *United States v. Hilton*, 619 F.2d 127, 131 (1st Cir. 1980), the Court of Appeals for this Circuit indicated that the Coast Guard could not constitutionally conduct a search more extensive than a document and safety inspection except by consent or where probable cause existed. The *Hilton* opinion was issued, however, before the en banc opinion in *Williams*, and the First Circuit has not yet decided whether to adopt the Fifth Circuit's view that probable cause is not required for a Coast Guard boarding and search of a vessel on the high seas in situations which do not fall within the document and safety rationale. *See United States v. Arra, supra* at 841 n.8. It is not necessary for this Court to anticipate whether the First Circuit will adopt the Fifth Circuit's *Williams* formulation, as the record in the present case more than adequately supports the conclusion that the Coast Guard had probable cause to believe that those aboard the PATRICIA were engaged in a conspiracy to smuggle contraband into the United States and that there was contraband aboard the vessel.[10]

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[10] The Court rejects defendant's contention that since it was the Canadian officials who actually stopped, boarded and first searched the PATRICIA, Section 89(a) cannot be invoked to authorize their actions. The Court has found that the Canadians and the Americans were engaged in a joint venture in the boarding and search of the vessel. Implicit in the holding that the participation of the United States Coast Guard was sufficient to trigger application of the Fourth Amendment, is the conclusion that the Canadians were acting "under the aegis of" the Americans. In such circumstances, there was no improper delegation of the authority conferred upon the Coast Guard by

For several days the crew of the O'HARA boat had seen the PATRICIA lying idly with no apparent purpose in the Gulf of Maine just outside United States waters, with one white man and several black men on board. An EPIC check disclosed that two of the land line telephone numbers which the white man requested the O'HARA captain to call were listed to suspected drug smugglers and suggested a possible connection between the PATRICIA and a suspected drug offloading site in Maine. An EPIC check further revealed that a vessel named PATRICIA was suspected of drug smuggling. The PATRICIA had no fishing gear or nets on deck, yet sat low in the water. The only identification was the name PATRICIA on the bridgewing. The vessel did not fly the flag of any country until approached by the LOUISBOURG and the RELIANCE, at which time it raised an Honduran flag. The PATRICIA carried sophisticated electronic and radar equipment. When the first Coast Guard plane arrived, the vessel got underway and fled, although the white man had reported to the O'HARA boat that she was disabled and in need of assistance. During the ensuing pursuit, the PATRICIA continuously refused to identify herself, to stop, or to deviate from her northeasterly course, despite repeated attempts by the Coast Guard to communicate with the vessel by radio, message block, smoke floats, flag hoists and loud hailer. During the entire night the PATRICIA was under observation, the vessel was operating without navigational lights, steering an erratic course toward the open sea. Only after the RCMP aboard the LOUISBOURG opened gunfire did the PATRICIA finally come to a stop. These facts add up to ample probable cause for the Coast Guard to believe that the PATRICIA was engaged

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Section 89(a). *See United States v. Warren*, 578 F.2d 1058, 1067 (5th Cir. 1978), *rev'd on other grounds*, 612 F.2d 887; *United States v. Bates*, 526 F.2d 966, 967 (5th Cir. 1976).

in a conspiracy to smuggle contraband into the United States. The seizure and search of the vessel were therefore authorized by Section 89(a).[11]

(b) *Constitutionality.* The Court has held that the Coast Guard undoubtedly had not only reasonable suspicion but probable cause to believe that the PATRICIA was engaged in a conspiracy to smuggle contraband into the United States. Whether or not the First Circuit adheres to the suggestion in *Hilton* that the Coast Guard cannot constitutionally conduct a nonconsensual search, other than a document and safety inspection, except upon probable cause, or decides to adopt the Fifth Circuit view which would permit such a search upon a reasonable suspicion standard, the existence of probable cause in the present case unquestionably satisfies the Fourth Amendment requirement of "reasonableness." *See United States v. Williams, supra. See also United States v. Hilton, supra*; *United States v. Arra, supra.*[12] The seizure and search of the PATRICIA did not violate any Fourth Amendment rights defendant may have had.

B. *The Interrogation of Defendant Hensel*

Defendant Hensel contends that the statements made by him while in Canadian custody were obtained in violation of

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[11] Because the Court concludes that Section 89(a) authorized the seizure and search, the Court need not consider whether, as the government urges, the stop was authorized by the Canadian Customs Act, R.S.C. 1970, c. 4 § 1 *et seq.*, or under the international common law doctrine of "right to approach," codified by Article 22 of the Convention on the High Sea, 13 U.S.T. 2312, T.I.A.S. No. 5200.

[12] As the Fifth Circuit observed in *Williams*, it follows from its conclusion that the existence of reasonable suspicion satisfied the requirements of the Fourth Amendment that the warrant requirement of the Fourth Amendment does not apply to maritime searches and seizures. *United States v. Williams, supra* at 1075. *See United States v. Arra, supra* at 842 n.7.

his Fifth Amendment rights because he was not given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1956), and because his statements were not voluntary. The Court disagrees.

[9] Where American officers actively participated in the arrest and interrogation of a defendant by foreign officials, *Miranda* warnings must be administered prior to questioning. *United States v. Emery*, 591 F.2d 1266, 1267-68 (9th Cir. 1978). Where, however, United States agents do not actively participate in the arrest and interrogation, the failure to give *Miranda* warnings does not invoke the Fifth Amendment exclusionary rule. *United States v. Trenary*, 473 F.2d 680, 681 (9th Cir. 1973); *United States v. Chavarria*, 443 F.2d 905 (9th Cir. 1971); *United States v. Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir.), *cert. denied*, 401 U.S. 939, 91 S.Ct. 935, 28 L.Ed.2d 219 (1971). *See also Pfeifer v. United States Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980). In such circumstances, the rationale for excluding statements made by a defendant is not present. As the Ninth Circuit pointed out in *United States v. Chavarria*, *supra* at 905,

> *Miranda* was intended as a deterrent to unlawful police interrogations. When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police. Therefore, so long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given *Miranda* warnings before questioning by foreign police will not, by itself, render his confession inadmissible.

In the present case, no American agent was present or in any way participated in the questioning of defendant by the Canadian officers. Nor is there any suggestion that the Ameri-

cans arranged for the Canadians to interrogate defendant in order to circumvent the requirements of the United States Constitution. Therefore, no purpose would be served by requiring the Canadian police to comply with *Miranda*, and the failure of the RCMP to give defendant *Miranda* warnings does not render his statements inadmissible.

[10] The Court also rejects defendant's contention that the statements he made to the Canadian agents were involuntarily made. The RCMP read to defendant the warnings required under Canadian law before each of his three interviews. Defendant was 30 years old at the time of his questioning, and a high school graduate. He suffered from no physical or mental disabilities. The testimony of the Canadian officers, which the Court accepts, is that he remained rational and composed throughout the interviews. The officers also flatly contradict defendant's testimony that he was subjected to threats and that he was under the influence of alcohol. Although defendant drank several beers before making his last statements to Cst. Parker, the consumption of alcohol does not require a finding that he lacked the capacity to think clearly and rationally. *See United States v. Holmes*, 632 F.2d 167, 168-69 (1st cir. 1980). In short, the government has carried its burden of establishing by a preponderance of the evidence that defendant's statements were "the product of a rational intellect and a free will," *Townsend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963), and that they were therefore voluntary. *Lego v. Twomey*, 404 U.S. 477, 482-87, 92 S.Ct. 619, 623, 30 L.Ed.2d 618 (1972); *United States v. Holmes, supra.*

III
ORDER

Defendant Hensel's motions to suppress evidence and statements are in all respects DENIED.

IT IS SO ORDERED.

UNITED STATES of America, Appellee,

v.

David Keith HENSEL, Defendant, Appellant.

UNITED STATES of America, Appellee,

v.

Gerald Wayne CASE, Larry Ronald Duke, Robert Curtis Hubbard, Charles Thad Standley and John Jacob Wells, Defendants, Appellants.

UNITED STATES of America, Appellee,

v.

Creig Lee DILL, Defendant, Appellant.

Nos. 81-1538 to 81-1540.

United States Court of Appeals,
First Circuit.

Argued Oct. 5, 1982.

Decided Jan. 25, 1983.

Rehearing and Rehearing En Banc Denied in No. 81-1538 Feb. 28, 1983.

Seven defendants were convicted in the United States District Court for the District of Maine, Edward Thaxter Gignoux, Chief Judge, of conspiracy to import and distribute marijuana and they appealed. The Court of Appeals, Breyer, Circuit Judge, held that: (1) even if a search on the high seas violated international law and was therefore not authorized by statute, and even if it also violated coast guard regulations, the exclusionary rule did not require suppression of its fruits; (2) no hearsay evidence was admitted; (3) defendants had no legitimate expectation of privacy in the license number of jeep

parked in a driveway; (4) the evidence was sufficient to sustain the convictions; (5) there was no error in admitting expert testimony about general practices of drug smugglers; (6) defendants were not improperly denied discovery; and (7) identification of defendant by a witness at a chance encounter in a courthouse snack bar did not violate defendants' Fifth or Sixth Amendment rights.

Affirmed.

See also 509 F.Supp. 1364 and 509 F.Supp. 1376.

1. Criminal Law 394.4(1)

Exclusionary rule applies to searches by American agents on the high seas. U.S.C.A. Const.Amend. 4.

2. Criminal Law 394.2(2)

Exclusionary rule does not require suppression of evidence seized by foreign police agents, except where foreign police conduct shocks judicial conscience of where American agents participated in foreign search, or foreign officers acted as agents for their American counterparts. U.S.C.A. Const. Amend. 4.

3. Criminal Law 394.6(4)

In prosecution for conspiracy to import and distribute marijuana, district court's finding that there was probable cause to board and search boat on high seas was supported by the evidence. U.S.C.A. Const. Amend. 4.

4. Shipping 9

Statute permitting Coast Guard to make searches and seizures upon the high seas did not authorize searches that violate international law. 14 U.S.C.A. § 89(a).

5. International Law 10.1

Act of Congress ought never to be construed to violate law of nations if any other possible construction remains.

6. International Law 7

International law does not allow one nation to search on high seas vessels belonging to another except in very special circumstances.

7. Shipping 9

Though coast guard regulations specifically require its units to obtain permission of coast guard commandant before searching foreign vessels on high seas, and although commandant generally grants permission only after foreign state has consented to search, violation of regulations does not automatically constitute violation of international law.

8. Criminal Law 394.4(1)

Even if search on high seas violated international law and therefore was not authorized by statute, and even if it also violated coast guard's "advance permission" regulation, exclusionary rule did not require suppression of fruits of search. 14 U.S.C.A. § 89(a).

9. Criminal Law 404(4)

In prosecution for conspiracy to import and distribute marijuane, glass with one defendant's nickname on it found at premises owned by conspirators, which tended to tie that defendant with conspirators, was not hearsay and was admissible. Fed.Rules Evid.Rule 801(a)(2), 28 U.S.C.A.

10. Searches and Seizures 7(10)

Defendants had no legitimate expectation of privacy in license number of jeep parked in their driveway where jeep was parked only 100 to 200 yards from subdivision road and was between that road and beach customarily used by public. U.S.C.A. Const.Amend. 4.

11. Conspiracy 44½

To convict defendants of conspiring to import marijuana into United States, Government bore burden of proving that

each defendant knowingly and intentionally joined the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

12. Criminal Law 419(1)

Possession is conduct and conduct is hearsay under Federal Rules of Evidence only if intended as assertion. Fed.Rules Evid.Rule 801(a)(2), 28 U.S.C.A.

13. Conspiracy 47(12)

Evidence sustained seven defendants' convictions of conspiracy to import and distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

14. Criminal Law 829(3)

In prosecution for conspiracy to import and distribute marijuana, trial judge's instructions on agreement, knowledge and intent were adequate and he did not err in failing to give instructions on those issues submitted by defendant.

15. Criminal Law 469

In prosecution for conspiracy to import and distribute marijuana, expert testimony by Drug Enforcement Administration agent about general practices of drug smugglers was admissible. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

16. Criminal Law 627.6(2)

In prosecution for conspiracy to import and distribute marijuana, defendant was not entitled to discovery of Drug Enforcement Administration and Justice Department documents relating to marijuana smuggling, which he alleged were essential to cross-examination of the DEA agent's expert testimony on drug smuggling in general, where agent did not indicate that his opinions were predicated on those documents and documents were only requested after agent testified on direct examination.

17. Criminal Law 627.8(2)

Request for discovery and inspection ordinarily must be made before trial. Fed.Rules Cr.Proc. Rule 16, 18 U.S.C.A.

18. Witnesses 8

Federal Rule of Criminal Procedure governing subpoenaes gave district court adequate authority to deny subpoena where production would have been unreasonable. Fed.Rules Cr.Proc. Rule 17, 18 U.S.C.A.

19. Criminal Law 1044.1(2)

Defendants were barred from asserting on appeal that Jencks Act and Freedom of Information Act supported his request for discovery where no FOIA or Jencks Act request was made to district court. 5 U.S.C.A. § 552; 18 U.S.C.A. § 3500.

20. Criminal Law 627.6(2), 1166(1)

Transcript of witness' testimony in prior trial did not come within language of Jencks Act and, in any case, Government's failure to disclose such testimony to defendants would be harmless error, since such testimony was part of public record. 18 U.S.C.A. § 3500.

21. Constitutional Law 266(3.2)

Fifth Amendment right to due process protects defendant against unduly suggestive identification procedures. U.S.C.A. Const.Amend. 5.

22. Criminal Law 339.10(3)

Witness' chance encounter with and identification of defendants in courthouse snack bar did not increase likelihood that witness would identify defendants as criminals and did not require suppression of his in-court identification of defendants where incident was not orchestrated by Government, and comments to witness by federal prosecutor to effect that witness might have such chance encounter with defendants, and witness' conversation with other witnesses, who assured him

that defendants were easy to identify, did not increase likelihood that witness would make mistaken identification. U.S.C.A. Const.Amend. 5.

23. Criminal Law 641.2

Defendant's Sixth Amendment right to counsel was not violated when witness identified defendant at chance encounter with defendant in courthouse snack bar. U.S.C.A. Const. Amend. 6.

24. Criminal Law 1036.1(4)

Defendants' contention that government agents use of optical equipment in observing them violated their Fourth Amendment rights could not be raised on appeal where defendants failed to present it to district court. U.S.C.A. Const.Amend. 4.

Michael Avery, Boston, Mass., with whom John P. Ward, Boston, Mass., was on brief, for appellant David Keith Hensel.

Edward T.M. Garland, Atlanta, Ga., with whom Steven H. Sadow, and Garland, Nuckolls & Catts, P.C., Atlanta, Ga., were on brief, for appellants Larry Ronald Duke and Robert Curtis Hubbard.

David C. Pomeroy, Portland, Me., with whom Wheeler, Pomeroy & Snitger, Portland, Me., was on brief, for appellant Charles Thad Standley.

Bruce H. Morris, Atlanta, Ga., with whom Devine & Morris and Melvin Gutterman, Atlanta Ga., were on brief, for appellant Gerald Wayne Case.

Mark J. Kadish, Atlanta, Ga., with whom Rosalyn S. Kadish, and Kadish, Davis & Brofman, P.C., Atlanta, Ga., were on brief, for appellant John Jacob Wells.

Joseph Beeler, Miami, Fla., with whom Barbara Green, Miami, Fla., was on brief, for appellant Creig Lee Dill.

Margaret D. McGaughey, Asst. U.S. Atty., Portland, Me., with whom Richard S. Cohen, U.S. Atty., Portland, Me., was on brief, for appellee.

Before TIMBERS,* Senior Circuit Judge, CAMPBELL and BREYER, Circuit Judges

BREYER, Circuit Judge.

We here consider appeals from several defendants convicted by jury trial of participating in a conspiracy to import and distribute marijuana. Rather than write separate opinions in these several cases, we here consolidate them and treat all the appellants' claims in one opinion. We first set forth the facts upon which many of the defendants' claims depend. Our description is based primarily upon that of the Maine federal district court found in 509 F.Supp. 1364 and 509 F.Supp. 1376. We then consider the claims that raise the most difficult legal issues — those of defendant Hensel — and we follow that analysis with a consideration of the claims of the other defendants. We affirm all of the convictions.

I

The Facts

On the morning of May 31, 1980, after a 24-hour chase on the high seas, a Canadian vessel stopped a 65-foot Honduran shrimp boat 65 miles southeast of Nova Scotia. On board the ship the police agents found defendant Hensel, a crew of eight Colombians, and 18.7 tons of marijuana. Three days later

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* Of the Second Circuit, sitting by designation.

Maine state police and federal Drug Enforcement Administration (DEA) agents raided the secluded cove on the coast of Maine where Hensel was to have delivered his cargo. They arrested several of the defendants and gathered the evidence at issue. We shall separately describe the events at sea and on land.

A

At Sea

On May 28, 1980, a local fishing vessel, the J. BRADLEY O'HARA, spotted an unfamiliar ship 90 miles southeast of Rockland, Maine. The ship, the M/V PATRICIA, did not seem to be engaged in fishing. Two days later, the PATRICIA approached the O'HARA and Hensel, captain of the PATRICIA, asked permission to use the O'HARA's radio to contact a "partner." Hensel explained that his ship's radio batteries were dead and that its generator did not work. The crew of the O'HARA assured Hensel that he could use the radio after they had hauled in their fishing nets. During that time, however, the O'HARA's captain became suspicious and sent the Coast Guard a message that the PATRICIA was disabled. When the PATRICIA again approached the O'HARA, the captain told Hensel he had contacted the Coast Guard, and he refused to let Hensel use his radio. "I told him that we knew what he was up to," the mate of the O'HARA testified, "and we didn't want any part of it." Hensel asked that the call be cancelled, but the Coast Guard had already dispatched aid. Hensel then asked the mate of the O'HARA to place three telephone calls. The O'HARA, however, simply relayed the numbers to the Coast Guard.

The Coast Guard sent at least one plane and the cutter RELIANCE to the scene. The plane piloted by Lt. Lugin-

buhl arrived at about 11:25 and found the PATRICIA lying dead in the water and flying no flag. Lt. Luginbuhl tried unsuccessfully to communicate with the PATRICIA by radio. After he had made several low passes over the ship, the PATRICIA got underway and began sailing toward the northeast.

Lt. Luginbuhl asked the El Paso Information Center computer to check the status of the PATRICIA and found that a ship named the PATRICIA (later discovered to be a different ship) was suspected of smuggling drugs. The Coast Guard ordered the lieutenant to follow the PATRICIA until the RELIANCE arrived; it also notified Agent Drinan of the DEA in Maine and the Canadian Coast Guard of the situation.

Lt. Luginbuhl continued to track the PATRICIA as it headed toward Nova Scotia in the northeast. After further unsuccessful efforts to communicate with the ship, he dropped a message block ordering the PATRICIA to turn around so that officers of the RELIANCE could board the ship. The PATRICIA, however, maintained its course. By 3:00 p.m., a Canadian Coast Guard plane arrived and at the request of the U.S. Coast Guard relieved Lt. Luginbuhl. This plane, too, tried to communicate with the PATRICIA by message block, and it tried to divert the ship from its course by using smoke floats. Nevertheless, the PATRICIA continued toward Nova Scotia. After about four hours, a U.S. Coast Guard plane resumed tracking the PATRICIA, but it was no more able than its predecessors to communicate with the PATRICIA or to turn it from its course.

By 7:00 p.m. it became clear the PATRICIA would escape into Canadian waters before the RELIANCE could intercept it. The Canadian authorities accordingly began their preparations to intercept the PATRICIA, and they dispatched their ship LOUISBOURG. They told the DEA they would board the PATRICIA if it came within Canadian waters, and Agent Drinan encouraged them to do so.

Meanwhile, the DEA discovered that two of the telephone numbers Hensel had asked the O'HARA to call were listed in the names of Florida men suspected of drug crimes. When Agent Drinan learned that the third number was for a Georgia exchange, he told the Coast Guard that the DEA had been monitoring a suspected drug ring on the Maine coast which used Georgia and Florida vehicles. American agents maintained contact with the Canadians throughout the night.

By 5:11 a.m. the Canadian ship LOUISBOURG was within sight of the PATRICIA, and by 6:00 a.m. the American ship RELIANCE had arrived. Both ships tried to communicate with the PATRICIA, using not only radio but flag hoists, a loud hailer, and flashing lights, but neither ship succeeded. The PATRICIA appeared badly rusted and was riding below its waterline. It displayed no nets or fishing gear and apparently contained substantial electronic equipment. Although it had the name PATRICIA on the bridgewing, it showed no homeport and no identification numbers on the hull. It had, by this time, hoisted a Honduran flag.

The RELIANCE notified the LOUISBOURG that since the PATRICIA was a Honduran ship, the RELIANCE officers could not board it without first obtaining the permission of the State Department and the government of Honduras — a process it expected to take 24 to 48 hours. The Canadians, however, believed that they could board the PATRICIA as soon as it came within 21 miles of the Canadian coast. Soon after 9:00 a.m. they told the RELIANCE that, if the RELIANCE did not act, they would. The RELIANCE in turn agreed to let the Canadians land a helicopter on board it if necessary, assured them that it would protect the LOUISBOURG, and apparently manned its fifty-caliber machine gun.

The Canadians swung the LOUISBOURG around the PATRICIA at high speed in an attempt to stop it with its wake. When that failed, they fired a 12-guage shotgun across the

PATRICIA's bow. The sailors aboard the PATRICIA ducked, and the Canadians then aimed at the wheelhouse where three or four men apparently stood. The Canadians blasted the wheelhouse twice, and the PATRICIA came to a halt.

Three armed Canadian agents boarded the PATRICIA and ordered the crew of eight Colombians and defendant Hensel to the stern of the boat. They loosened the bolts on two closed hatches at the bow of the ship and found over 600 burlap bags containing 18.7 tons of marijuana. They arrested Hensel and the Colombians and, because the Colombians spoke no English, used interpreters from the RELIANCE. One of the officers of the RELIANCE then boarded the PATRICIA to check the documentation of the vessel and to inspect its equipment, as well as to ascertain the identities of those arrested. The Canadians towed the ship to Nova Scotia where they unloaded it and stored the cargo.

After originally telling the Canadians that he was from Connecticut and that his ship was headed for Africa, Hensel admitted that his true address was in Florida, that the ship was indeed headed for the United States, and that he was to have earned $400,000 from the delivery. The Canadian officials eventually decided not to prosecute Hensel and on June 3 expelled him from the country. Hensel was flown to Boston, where Agent Drinan met him at the airport. Hensel called an attorney, and Agent Drinan then arrested Hensel. Hensel appeared before a magistrate and was charged with conspiracy to import marijuana.

B

On Land

The investigation into the activities on the Maine coast had begun about a month before the PATRICIA arrived. In late

April 1980 agents of the DEA and the Maine state police learned that Lot No. 3 of the Turkey Cove subdivision in Tenant's Harbor, Maine, had been bought in the name of defendant Duke's father for $170,000 in cash. The lot contained just under three acres of relatively secluded land on the Maine coast. On it stood three wood-frame buildings, a wooden garage, and a deepwater dock that gave the residents access to the Atlantic Ocean. A short driveway connected the buildings to a subdivision dirt road, which in turn led to Glenmere Road, a public highway.

The agents also learned that in late April defendant Dill had bought a 32-foot sport-fishing boat, SUNSHINE, in defendant Hubbard's name, and had paid for it with four checks totalling $30,000. Dill had installed in the boat $8,000 worth of electronic equipment. Although Dill and an accomplice told the sellers of the boat that they planned to take it to Massachusetts, agents later saw it at the Turkey Cove lot. Dill, the agents also discovered, had been convicted in 1974 in Venezuela (and sentenced to four years in prison) for possessing 2½ kilograms of cocaine.

On the basis of this information the DEA and the Maine police set up a surveillance program to monitor activity at the Turkey Cove property. Agent Drinan of the DEA and Sgt. Bailey of the Maine police coordinated the operation. They established posts on adjacent properties as well as across the St. George River, and two or three times a week they conducted aerial surveillance. During the day they used a telescope, a spotting scope, and binoculars to monitor the property, and at night they used a nonmagnifying nightscope. The agents could see people and vehicles on Lot No. 3, but they were unable to observe activities inside any of the buildings.

During May the agents watched the SUNSHINE sail out to sea many times. The boat generally left in the afternoon and returned late at night, often without navigational lights. The

agents also saw several vehicles on the property, including eight out-of-state, large-capacity, cargo vans. Near the end of May they observed people strengthening the dock, and they noticed that some of this work was being done at night by flashlight.

At about 11:30 p.m. on June 2 a state policeman at the observation post across the river saw the SUNSHINE return to Turkey Cove accompanied by a sixty- to seventy-foot boat. Although the agents later learned that the SUNSHINE had run aground and was merely being towed home, they initially suspected that this larger boat might be the narcotics boat for which they had been waiting. Accordingly, Agent Cunniff of the DEA and Cpl. Sinclair of the Maine police went to scout the Turkey Cove property. At about 12:30 a.m. they made their way down the subdivision access road and walked to the beach through the woods on the land adjacent to Lot No. 3. They then followed the beach toward Lot No. 3 until they reached a spot where debris blocked their way. Cpl. Sinclair waded through waist-high water around the debris in order to approach the dock. Agent Cunniff waited some minutes and then joined Cpl. Sinclair. Although several people boarded the larger boat, no one unloaded it, and at about 3:00 a.m. the larger boat left.

Having discovered that the boat was not delivering drugs, Agent Cunniff and Cpl. Sinclair decided to leave Turkey Cove. Rather than return through the deep water, however, they chose to take what they said they thought was the most direct route back to Glenmere Road — a route through Lot No. 3. As they walked along the Lot No. 3 driveway, they passed a tan jeep and recorded its license number.

Through a check of the license number, the agents discovered later that night that the jeep was owned by defendant Wells. Agent Drinan then obtained Wells' telephone number and found that the third phone number Hensel had given to

the O'HARA had been Wells' number — with two digits transposed. At this point, the connection between the PATRICIA and the Turkey Cove property became clear. Moreover, at about 4:30 the next afternoon the agents monitoring Turkey Cove learned that Hensel had been deported from Canada and arrested at Boston's Logan airport. More critically, however, they learned that Hensel had telephoned an attorney in Boston and told him to call a woman who "would know who to call and know what to do." Worried that Hensel's acquaintance would have relayed the news of the PATRICIA to those at Turkey Cove, the agents decided to survey the property more closely and, if appropriate, to make arrests.

At about 7:15 p.m., Agent Cunniff saw the tan jeep turn off the access road at Turkey Cove onto Glenmere Road. He followed the jeep and signalled it to stop. Defendant Case climbed out of the jeep and asked if something was wrong. Agent Cunniff identified himself as a narcotics agent and, when he saw defendant Hubbard crouched in his seat in the jeep, opened door and asked Hubbard to step out. As Agent Cunniff did so he found a CB radio with a 12-volt battery and an antenna. Two state policemen had arrived by this time, and the agents put the defendants under arrest.

Agent Cunniff and Cpl. Bailey feared, however, that Hubbard might have used the CB radio in the jeep to alert the men at Turkey Cove. To prevent those present from escaping or destroying evidence, the police decided to raid Lot No. 3. They arrested defendant Standley by the boathouse and found defendant Duke sitting at a desk in the main house. Duke was writing on sheets of paper, later entered into evidence as Government Exhibit 111, and a yellow pad, Government Exhibit 110, lay nearby. The agents found $2,000 in cash on Duke's desk and $44,000 in an open brief case. Agent Cunniff arrested Duke; defendants Dill and Wells apparently were arrested later.

The seven appellants, together with two other defendants, were indicted by a grand jury on June 12, 1980, and charged with conspiracy to possess with intent to distribute and to import into the United States approximately 18.7 tons of marijuana, in violation of 21 U.S.C. §§ 846 & 963. Eight of the defendants were tried together before a jury with Chief Judge Gignoux, of the U.S. District Court for the District of Maine, presiding. On May 15, 1981, the jury found the seven appellants guilty as charged and acquitted an eighth defendant William Storey. We previously considered a government appeal from a suppression order concerning the ninth defendant, John Downing, in *United States v. Downing*, 665 F.2d 404 (1st Cir. 1981). The lower court's decision on several of the evidentiary issues involved in the appeal at bar can be found at *United States v. Hensel*, 509 F.Supp. 1364 (D.Me. 1981) and *United States v. Hensel*, 509 F.Supp. 1376 (D.Me. 1981).

II

Hensel's Suppression Claim

[1] We first consider defendant Hensel's suppression claim. He argues that the federal government obtained evidence from the PATRICIA in violation of his Fourth Amendment rights and that the "exclusionary rule" therefore required the district court to suppress all evidence obtained through that seizure. *See Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). We recognize that the "exclusionary rule" applies to searches by American agents on the high seas. *See United States v. Green*, 671 F.2d 46, 53 (1st Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2962, 73 L.Ed.2d 1352 (1982); *United States v. Hilton*, 619 F.2d 127, 131 (1st Cir.), *cert. denied*, 449 U.S. 887, 101 S.Ct. 243, 66 L.Ed.2d 113 (1980); *United States v. Miller*, 589 F.2d 1117, 1125-26 (1st Cir. 1978),

cert. denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979); *see also* Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 Harv.L.Rev. 725, 726 & n.9 (1980) [hereinafter cited as Harv. Note]. We are also willing to assume the search violated Canadian law. Even so, however, we believe that the "exclusionary rule" does not authorize suppression here.

We shall analyze Hensel's argument by examining three separate questions. First, is the "exclusionary rule" inapplicable because of the fact that the Canadians, not the Americans, searched the ship? Second, if the exclusionary rule is applicable despite the actions of the Canadians, did the search violate Hensel's constitutionally protected right of privacy? Third, if not, is suppression nonetheless required because the search was unauthorized by statute or Coast Guard regulations?

[2] 1. We first consider whether the "exclusionary rule" does not apply to this search because it was conducted by Canadians. As the government points out, the "exclusionary rule" does not require the suppression of evidence seized by foreign police agents, for the actions of an American court are unlikely to influence the conduct of foreign police. *See United States v. Rose*, 570 F.2d 1358, 1361-62 (9th Cir. 1978); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied sub nom. Martin v. United States*, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). This principle does not dispose of the case, however, for there are two well-established exceptions to this rule: (1) where foreign police conduct "shock[s] the judicial conscience," *id.* at 139 and (2) where American agents "participated in the foreign search, or . . . [the foreign officers acted] as agents for their American counterparts. . . ." *Id.* The district court held that the second exception applies here.

The issue is one of applying a legal label to a complex set of facts, some of which suggest significant American involvement

while others suggest the contrary. On the one hand, as the district court noted, the Americans began the search, the Americans asked the Canadians to join in the effort, an American DEA agent urged the Canadians to seize the ship if it entered Canadian waters, the RELIANCE (an American ship) showed firepower and provided back-up assistance during the Canadians' boarding, the RELIANCE provided interpreters after the boarding, and an American officer participated in a second search of the PATRICIA. These factors suggest an American-Canadian "joint venture."

On the other hand, the Canadians controlled the search of the PATRICIA, they were searching for evidence of violations of Canadian law, they intended to prosecute Hensel for Canadian crimes, the initial boarding party consisted only of Canadians, the Canadians retained control of all the evidence for some time after its seizure, and American agents may have told the Canadians to make their boarding decision independently. As the district court noted, the question is a "close" one. We see no obvious error, and we shall assume that U.S. participation was sufficient to validate Hensel's foreign search argument. We need not decide this factually based issue definitively, however, for a determination against the government goes not change the ultimate result.

[3] 2. Next, we must consider whether the search violated any privacy right of Hensel that the Fourth Amendment protects. We believe not. Of course, the search was warrantless — a fact that might ordinarily make it "unreasonable" if it had violated a citizen's reasonable expectations of privacy. *See, e.g., Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *United States v. Miller*, 589 F.2d at 1124; Harv. Note, *supra*, at 727-28. But there are exceptions to the warrant requirement. When this case was tried in 1981, this circuit recognized an exception for searches on the high seas based on "probable cause." *See United States v.*

Hilton, 619 F.2d at 131. Later, in 1982, we held that "reasonable suspicion" was sufficient to allow a high seas Coast Guard search. *See United States v. Green*, 671 F.2d at 53. The district court, following *Hilton's* stricter standard, held that the Coast Guard had probable cause to believe that those aboard the PATRICIA were conspiring to smuggle contraband into the United States and that they carried contraband aboard the ship. The court wrote:

> [T]he record in the present case more than adequately supports the conclusion that the Coast Guard had probable cause to believe that those aboard the PATRICIA were engaged in a conspiracy to smuggle contraband into the United States and that there was contraband aboard the vessel.
>
> For several days the crew of the O'HARA boat had seen the PATRICIA lying idly with no apparent purpose in the Gulf of Maine just outside United States waters, with one white man and several black men on board. An EPIC check disclosed that two of the land line telephone numbers which the white man requested the O'HARA captain to call were listed to suspected drug smugglers and suggested a possible connection between the PATRICIA and a suspected drug offloading site in Maine. An EPIC check further revealed that a vessel named PATRICIA was suspected of drug smuggling. The PATRICIA had no fishing gear or nets on deck, yet sat low in the water. The only identification was the name PATRICIA on the bridgewing. The vessel did not fly the flag of any country until approached by the LOUISBOURG and the RELIANCE, at which time it raised an Honduran flag. The PATRICIA carried sophisticated electronic and radar equipment. When the first Coast Guard plane arrived, the vessel got underway and fled, although the

> white man had reported to the O'HARA boat that she was disabled and in need of assistance. During the ensuing pursuit, the PATRICIA continuously refused to identify herself, to stop, or to deviate from her northeasterly course, despite repeated attempts by the Coast Guard to communicate with the vessel by radio, message block, smoke floats, flag hoists and loud hailer. During the entire night the PATRICIA was under observation, the vessel was operating without navigational lights, steering an erratic course toward the open sea. Only after the RCMP aboard the LOUISBOURG opened gunfire did the PATRICIA finally come to a stop. These facts add up to ample probable cause for the Coast Guard to believe that the PATRICIA was engaged in a conspiracy to smuggle contraband into the United States.

United States v. Hensel, 509 F.Supp. 1364, 1374 (D.Me. 1981). The district court's finding of probable cause is fully supported by the evidence.

3. Finally, we consider Hensel's claim that the evidence must be excluded because, whether or not there was "probable cause," the search exceeded the Coast Guard's statutory authority (and violated its regulations). He claims that the only statute that could have authorized the search is 14 U.S.C. § 89(a), which states:

> The Coast Guard may make . . . searches, seizures and arrests upon the high seas . . . for the prevention, detection and suppression of violations of laws of the United States. For such purposes [Coast Guard] . . . officers may . . . go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States . . . and search the vessel
>
> . . . .

Hensel believes that this statute does not authorize searches that violate international law and that the search of a foreign vessel without the flag state's permission is such a violation of international law. Therefore, Hensel argues that the search at bar was not authorized by statute, that it is therefore an "unreasonable search" within the terms of the Fourth Amendment, and that consequently its fruits should be suppressed.

This claim is best analyzed in terms of three separate questions: (a) Does the relevant statute authorize searches that violate international law? (b) If not, did this search violate international law? (c) If so, does the "exclusionary rule" require suppression of the evidence?

[4, 5] (a) We agree that § 89(a) does not authorize searches that violate international law. The rule is well established, at least since the time of Chief Justice John Marshall, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); *see, e.g., Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21, 83 S.Ct. 671, 677, 8 L.Ed.2d 547 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578, 73 S.Ct. 921, 926, 97 L.Ed. 1254 (1953); Note, "*Smoke on the Water*": *Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone*, 13 N.Y.U.J. Int'l L. & Pol. 249, 284-85, 295 (1980) [hereinafter cited as N.Y.U. Note]. Moreover, the legislative history of § 89(a) does not suggest that Congress intended to violate this principle. Section 89(a) was enacted in response to a Supreme Court opinion holding that the Coast Guard could seize American ships on the high seas to enforce revenue laws, but implying that it could *not* do so to enforce other laws. *See Maul v. United States*, 274 U.S. 501, 47 S.Ct. 735, 71 L.Ed. 1171 (1927); H.R.Rep. No. 2452, 74th Cong., 2d Sess. 2-3

(1936); S.Rep. No. 2211, 74th Cong., 2d Sess. 2 (1936). Justices Brandeis and Holmes, concurring in *Maul*, disagreed with the majority opinion's implication, for they believed the Coast Guard should be able to seize American ships on the high seas to enforce any American law. They assumed, however, that Congress would conform with general principles of international law — principles which did not "confer the general authority to seize foreign vessels upon the high seas." *Maul v. United States*, 274 U.S. at 523 & n.26, 47 S.Ct. at 741 & n.26 (Brandeis & Holmes, J.J., concurring). Congress took note of the opinion of Justices Brandeis and Holmes, and sought to enact the Brandeis/Holmes concurrence. See H.R. Rep. No. 2452, 74th Cong., 2d Sess. 1-3 (1936); S.Rep. No. 2211, 74th Cong., 2d Sess. 1-2 (1936). Congress wished to authorize the search of vessels on the high seas to the extent such searches conformed to international law, but there is no indication that it wished to go further.

[6] (b) We next consider whether the search violated international law — a difficult question. Despite the implication of Fifth Circuit dicta to the contrary, *see United States v. Williams*, 617 F.2d 1063, 1076 (5th Cir. 1980) (*en banc*) (§ 89(a) allows high seas searches of foreign vessels without flag state permission, provided reasonable suspicion exists); Harv. Note, *supra*, at 727 n.11, international law does not allow one nation to search on the high seas vessels belonging to another except in very special circumstances. As a fundamental rule, the proposition "that a merchant ship flying the flag of a recognized State is immune from all interference on the high seas by the ships of any other than her own State" is widely accepted. C. Colombos, *The International Law of the Sea* 311 (6th Ed. 1967); *see The Sagatind*, 4 F.2d 928, 931 (S.D. N.Y. 1925) (A. Hand, J.); H. Smith, *The Law and Custom of the Sea* 64-65 (3d ed. 1959); Harv. Note, *supra*, at 727 n.11. As stated in the Convention on the High Seas:

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.

Convention on the High Seas art. 6(1), *opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962). This statement embodies the principle of "freedom of the seas," the principle for which we fought the War of 1812.

The Convention on the High Seas apparently allows only narrow exceptions to this rule of freedom of navigation, for the Convention itself states that the exceptions will be "provided for in international treaties or in these articles." Commentators agree: "even suspicious conduct will not justify active interference [with a foreign merchant vessel on the high seas in peacetime] except in those cases, such as slave trading, where it is authorized by treaty." H. Smith, *supra*, at 64-65; *accord*, *e.g.*, *C. Colombos*, *supra*, at 310-15; N.Y.U. Note, *supra*, at 276 & n.107; Note, *Free Navigation: Examination of Recent Actions of the United States Coast Guard*, 13 Vand. J. Transnat'l L. 141, 144-45 (1980) [hereinafter cited as Vand. Note].

Thus, the Convention states that we should look to a treaty — in this case the Convention on the High Seas itself — to determine whether a search violates international law. The Convention, as interpreted in light of recognized principles of international law, provides several exceptions. It allows the ship of one state to search another's ship on the high seas when those on the searching ship suspect the foreign ship of piracy, suspect the ship of engaging in the slave trade, suspect that the ship despite the foreign flag is a domestic ship, are engaged in hot pursuit, or have obtained the permission of the flag state. *See* Convention on the High Seas, *supra*, arts. 14-23; H. Smith,

supra, at 65-70; Vand. Note, *supra*, at 144-47. The Convention may also allow searches in cases where those on the searching ship believe that the foreign ship threatens the security of their own nation. *See* Vand. Note, *supra*, at 146 n.19; *cf.* H. Smith, *supra*, at 70-71. Arguably, three of these exceptions apply here.

First, the Coast Guard may have had reason to believe that the PATRICIA was either a domestic ship or a stateless ship over which any nation may assert jurisdiction. *See* Smith, *supra*, at 64-65; Vand. Note, *supra*, at 156. The PATRICIA, after all, sailed for a considerable time with no flag despite numerous attempts to communicate with it, and it hauled up its Honduran flag only at the eleventh hour.

Second, the Coast Guard arguably searched the ship with Honduras' consent. Given the need for speedy action, the hostility shown by all nations including Honduras to the international drug trade, *see Restatement (Revised) of Foreign Relations* § 522(2)(a) & comment c (Tent. Draft No. 3, 1982) ("general condemnation" of drug traffic); *Restatement (Second) of Foreign Relations* § 34 note 2 (1965) ("universal condemnation" of drug traffic), and the fact that Honduras apparently did not protest the seizure, Honduras may arguably be said to have ratified the search. *Cf. United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979) (where Bahamas government's confirmation of its permission to seize ship referred to wrong registration number but where Bahamas government did not protest seizure of ship, defendant cannot contest validity of permission), *cert. denied sub nom. Sarmiento v. United States*, 444 U.S. 1014, 100 S.Ct. 664, 62 L.Ed. 2d 644 (1980).

[7] Although Coast Guard regulations specifically require its units to obtain the permission of the Coast Guard Commandant before searching foreign vessels on the high seas, *see* Commandant Instruction No. 16244.1 (1978), and although

the Commandant generally grants permission only after the foreign state has consented to the search, a violation of this regulation does not automatically constitute a violation of international law.

Third, some authorities suggest that coastal nations have a right to search hovering vessels up to a "reasonable" distance from shore where serious crime is at issue, even if that search extends beyond the state's territorial waters or contiguous zone. *See* Brown, *Protective Jurisdiction*, 34 Am. J. Int'l L. 112, 114 (1940) ("Questions concerning the extent of the zone of protective jurisdiction . . . can only be answered by the rule of reason in each individual case."); *Comment to Draft of Convention on the Law of Territorial Waters*, art. 20, 23 Am. J. Int'l L.Spec.Supp. 334, 335 (1929) (zone where search is allowed "is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high seas"); *see also Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234-35, 2 L.Ed. 249 (1804); *The Panama*, 6 F.2d 326, 327 (S.D.Tex. 1925); *The Rosalie M.*, 4 F.2d 815, 816 (S.D.Tex. 1925), *aff'd on other grounds*, 12 F.2d 970 (5th Cir. 1926); *The Grace and Ruby*, 283 F. 475, 478 (D. Mass. 1922); Dickenson, *Jurisdiction at the Maritime Frontier*, 40 Harv.L.Rev. 1, 21-22 (1926). Such a flexible interpretation of a nation's "protective jurisdiction," *see* Brown, *supra*, conceivably fits within the exception to the free navigation principle related to "national security" — a provision arguably implicit in the High Seas Convention. *Cf.* H. Smith, *supra*, at 70-71; Vand. Note, *supra*, at 145-46 & n.19. Although we recognize that a provision for Coast Guard searches up to sixty-two miles from shore proved highly controversial during prohibition, see Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law*, 29 U. Miami L.Rev. 700, 709 — 11 & nn. 35-36

(1975), because the antipathy to international drug traffic is more widespread than was the antipathy to the liquor trade, *see id.* at 720-21, and because the use of hovering "mother ships" has become so common, the reasonableness of searches beyond the contiguous zone may now be more widely accepted. *See Restatement (Revised) of Foreign Relations* § 522(2)(a) & comment c (Tent. Draft No. 3, 1982) (search but not seizure of narcotics smuggling ship permitted).

The application of the first two of these possible exceptions to this case, however, would involve factually based determinations not made by the district court, and to apply the third would require a difficult exploration of the murky waters of international law. Rather than remand the case or conduct that exploration, we shall assume for the sake of argument that the exceptions do not apply, and that the search therefore exceeded the bounds of § 89(a). We shall also assume that the Coast Guard failed to comply with its regulation requiring Honduras' advance permission. For, as discussed below, even under these assumptions we believe the evidence was properly admitted.

[8] (c) We turn then to the final question: assuming that the search violated international law and therefore was not authorized by § 89(a), and assuming that it also violated the Coast Guard's "advance permission" regulation, does the "exclusionary rule" require suppression of its fruits? We think not. The Supreme Court has held that lack of statutory authority and the contravention of a regulation do not automatically invoke the exclusionary rule. *See United States v. Caceres*, 440 U.S. 741, 755, 99 S.Ct. 1465, 1473, 59 L.Ed.2d 733 (1979) ("we decline to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of these rules"); *United States v. Giordano*, 416 U.S. 505, 524-29, 94 S.Ct. 1820, 1831-33, 40 L.Ed.2d 341 (1974); *see also* 1 W. LaFave, *Search and Seizure* § 1.3(b) (1978). The

exclusionary rule was not fashioned to vindicate a broad, general right to be free of agency action not "authorized" by law, but rather to protect certain specific, constitutionally protected rights of individuals. Were this not so, courts might have to suppress, for example, information that an agency such as the FCC (or Department of Labor) gathers in a Community Antenna Television regulatory proceeding (or a Fair Labor Standards Act proceeding) that later turns out to have been beyond the agency's statutory authority. *Cf. United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) (FCC's authority over CATV "is restricted to that reasonably ancillary to the effective performance for the regulation of television broadcasting"); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944) (construing scope of administrative authority under FLSA). Yet, the fact that an agency's employees may exceed the scope of a statute's or a regulation's authority does not automatically make their actions "unreasonable" either in Fourth Amendment terms or as a matter of ordinary understanding of reasonableness. Thus, it is not surprising that the Supreme Court in *Caceres* denied any such principle of automatic exclusion.

On the other hand, courts have found strong reason to apply the exclusionary rule if an agency gathered information "in direct violation of the constitutional rights of the defendant. . . ." *Weeks v. United States*, 232 U.S. 383, 398, 34 S.Ct. 341, 346, 58 L.Ed. 652 (1914). But, in this case the search violated none of Hensel's constitutionally protected interests. For reasons previously stated, *see* p. 25 *supra*, the search did not invade Hensel's Fourth Amendment privacy interests, for the search was supported by "probable cause." Hensel is wrong in suggesting *United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977), holds to the contrary, for *Ramsey* supports the notion that a court must analyze the stat-

ute or regulation involved in terms of the interests protected by that statute or regulation before deciding whether to invoke the exclusionary rule. In this case, the statute and regulation arguably violated (insofar as they incorporate principles of international law) were designed not to protect the privacy rights of ship captains, but rather to protect the rights of foreign sovereigns. In such a situation, we find the Fifth Circuit's conclusion in *United States v. Cadena*, 585 F.2d 1252, 1261 (5th Cir. 1978), directly on point: "[T]here is no basis for concluding that violation of these international principles must or should be remedied by application of the exclusionary rule or by dismissal of the indictment unless Fourth Amendment interests are violated." Accordingly, we reject the argument that the Coast Guard's violation of the statute and regulation in this case requires us to apply the exclusionary rule.

A related way to reach the same conclusion is to say that Hensel lacks "standing." That is, Hensel is not entitled to invoke the exclusionary rule on his own behalf, for any violation of international law invaded not his rights but rather the rights of Honduras. The rule of international law in the case at bar is a rule designed to secure peace among nations, not to protect the privacy of individuals. As one commentator wrote, the principle of freedom of the seas "does not protect the smuggler, but it forbids the claim, generally, to jurisdiction on the high seas . . . ." W. Masterson, *Jurisdiction in Marginal Seas with Special Reference to Smuggling* 383-84 (1929); *see* McDougal & Burke, *Crisis in the Law of the Sea: Community Perspective versus National Egoism*, 67 Yale L.J. 539, 539 (1958) ("The historic function of the international law of the sea has long been recognized as that of achieving an appropriate balance between the special exclusive demands of coastal states, and other special claimants and the general inclusive demands of all other states in the world arena."). Even if international law gives Hensel as captain a right to sue for dam-

ages suffered during an illegal search, *see The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 42, 6 L.Ed. 405 (1826). The Convention on the High Seas, *supra* art. 22(3); *Restatement (Revised) of Foreign Relations* § 522(4) (Tent. Draft No. 3 1982) (damages awardable if suspicions of narcotics traffic prove unfounded), this compensation right derives from the sovereign's right to obtain redress for damages suffered, for "rights under international common law must belong to sovereign nations, not to individuals . . . ." *United States v. Williams*, 617 F.2d at 1090. In brief, international law protects Honduras, not Hensel. And Honduras, as far as this record reveals, does not care.

The Supreme Court has made clear that a defendant cannot invoke even the *privacy* interests of a third party in order to complain of an unlawful search, *United States v. Payner*, 447 U.S. 727, 731, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980). Thus, Hensel cannot invoke the interests of Honduras, especially since Honduras' interests are not *privacy* interests, are waivable, and have not been asserted by Honduras. *See also Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

In sum, whether or not Canadian law authorized the seizure, whether or not there was sufficient evidence of a "joint venture" to invoke constitutional protections, and whether or not the seizure was unlawful under international law, the evidence against Hensel was properly admitted.

III

Hensel's Hearsay Argument

[9] We turn next to a minor matter, and Hensel's only additional argument for reversal. Hensel claims that the trial

court erred in admitting into evidence a glass found at the Turkey Cove property. The glass had on it the word "Dink," Hensel's nickname, and tended to tie Hensel to those at Turkey Cove. As admitted to show this relation, Hensel states, the glass was hearsay.

We are tempted to say any error was "harmless" as to Hensel, *see, e.g., United States v. Honneus*, 508 F.2d 566, 572-73 (1st Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975), but we need not do so, for the glass was properly admitted. The fact that the word "Dink" appears on the glass does not itself make the glass hearsay evidence, for no assertion intended by the act of putting the word on the glass was relevant to the chain of inferences the government wished the jury to draw. The jury was not asked to infer anything about the person who put the name on the glass, who for all we know or care works in a factory that turns out "name" glasses by the score. Rather, the jury was asked to infer that Dink Hensel was likely to have possessed a glass with the name "Dink" on it and that he, or someone he knew, placed it in the house at Turkey Cove. The first of these inferences is merely circumstantial. There is no obvious way it depends upon the statement or state of mind of any out-of-court declarant.

The second of these inferences could involve hearsay only if one accepts a highly complex line of argument: Hensel might claim that he would like to cross-examine the "unknown" person who brought the glass to Turkey Cove on the ground that this out-of-court person's state of mind is relevant to the validity of the second inference. In order to invoke the hearsay rule, Hensel would have to argue that this individual's "nonverbal conduct" in placing the glass in the house was "intended by him as an assertion," Fed.R.Evid. 801(a)(2), that "Hensel was here." Even were one to make the heroic assumption that this was Hensel's argument, it fails. It fails because Hensel did not preliminarily show the district judge that placing the glass in

the house was intended as an "assertion" (*e.g.*, that it was designed to "frame" Hensel). Yet, the Federal Rules of Evidence "place the burden [of proving such an assertive intent] upon the party claiming that the intention existed." Fed.R.Evid. 801 Advisory Committee note (a). Hence, the glass was not shown to be hearsay and it was properly admitted.

IV

The Other Defendants' "Search and Seizure" Issue

Defendants Case, Duke, Hubbard, and Standley challenge the admission of all evidence the government obtained as a result of Agent Cunniff's observation of the license number of the jeep on Lot No. 3 on June 3. This license number was a key piece of evidence. It showed that the jeep belonged to Wells whose telephone number Hensel had given to the O'HARA prior to the Coast Guard chase. Thus, the license number helped link the ship to the defendants on shore, and much subsequently obtained evidence is arguably a "fruit" of its observation.

For purposes of this appeal we accept the district court's findings, for they are adequately supported in the record. Agents Cunniff and Sinclair walked along to the public beach and waded through waist-high water to observe the dock on Lot No. 3 where they thought a ship carrying drugs was about to dock. The agents apparently believed that the only way back to civilization without braving the deep water lay through Lot No. 3. Accordingly, they crossed the lot to return to the public access road, and along their way saw the jeep in the driveway and noted the license number. Under these circumstances, the agents may have had a legal right to pass through Lot No. 3. *See, e.g., Ploof v. Putnam*, 81 Vt. 471, 71

A. 188 (1908). Even if we assume they were trespassers, however, we believe they did not violate any of the defendants' Fourth Amendment rights.

[10] To show that their constitutional rights were violated, defendants must show that they had "a legitimate expectation of privacy" in the license number of the jeep parked in the driveway. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980); *United States v. Salvucci*, 448 U.S. 83, 91-92, 100 S.Ct. 2547, 2552-53, 65 L.Ed.2d 619 (1980); *Rakas v. Illinois*, 439 U.S. at 149, 99 S.Ct. at 433. The district court found no such legitimate expectation, given that a license plate is an item normally revealed to the public and that this license plate was observed in a place where the owner could not reasonably have expected it to remain hidden. *United States v. Hensel*, 509 F.Supp. at 1386.

The fact that the plate itself is designed for public exposure, while relevant, *see United States v. Humphries*, 636 F.2d 1172, 1179 n.12 (9th Cir. 1980), *cert. denied*, 451 U.S. 988, 101 S.Ct. 2324, 68 L.Ed.2d 846 (1981), is not determinative. It would not, for example, justify the search of a bedroom if the plate were hidden in the mattress. Thus, we have examined the record, including the aerial photographs, with some care to determine the nature of the place where the jeep was parked.

The testimonial descriptions and the photographs suggest that the driveway to Lot No. 3 is not quite so nestled in the "middle of nowhere" as defendants would have us believe. Rather, they indicate that houses and farms are scattered every few hundred yards along the highway, and that other residents have built cabins along the coast. The public highway runs within one-quarter to one-half mile of the buildings on Lot No. 3, and three-quarters of the distance from the building to the highway is spanned by a semi-public road -- a sub-

division road that was open to people other than the owners or users of Lot No. 3. The record contains testimony that members of the public generally considered the beach open to their use for clamming and "gunning," and that they used the wooded area for hauling wood and fishing. On the other hand, there were "no trespassing" signs and there was a chain across the drive (although the government produced testimony that the chain and all but one sign first appeared after June 3). In any event, taken together, the evidence could lead the district court reasonably to conclude that the defendants should have expected that a license plate on a jeep parked on their driveway — apparently only one or two hundred yards from a subdivision road, and squarely between that road and a beach used at least sometimes by clammers, hunters and others — would not remain hidden from the occasional passerby.

We have also reviewed the case law on the subject. This case seems a less compelling one for defendants than many other cases in which similar searches were upheld. *See United States v. Lace*, 669 F.2d 46 (2d Cir. 1982) (surveillance of 70-acre Vermont farm by agents who entered the farm in military camouflage uniforms and maintained round-the-clock surveillance with such equipment as nightscopes, 130-power Questarlens, and infra-reg goggles); *United States v. Ramapuram*, 632 F.2d 1149 (4th Cir. 1980) (search of trunk of junk car abandoned on farm owned by defendant's father, where agents were able to reach car only by driving 200 yards down private road and then walking by foot across open field), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981); *see also United States v. Edmonds*, 611 F.2d 1386 (5th Cir. 1980) (search of private dock area upheld, where public generally considered it open to public); *United States v. Humphries*, 636 F.2d 1172, 1178-79 (9th Cir. 1980) (evidence obtained as a result of an agent's entrance onto private driveway to observe license number of parked car), *cert. denied*, 451 U.S. 988, 101 S.Ct. 2324, 68 L.Ed.2d 846 (1981).

We have been unable to find any case in which courts have accepted claims similar to that of defendants. And, the cases they have cited are distinguishable. *See United States v. Oliver*, 657 F.2d 85 (6th Cir. 1981) (search unconstitutional where agents passed many "No Trespassing" signs and locked gate along private road, and were told to leave premises); *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974) (search unconstitutional where agents searched shaving kit hidden in backyard); *United States* v. *Davis*, 423 F.2d 974 (5th Cir.) (search unconstitutional where agents made warrantless search of defendant's yard and seized pistol), *cert. denied*, 400 U.S. 836, 91 S.Ct. 72, 27 L.Ed.2d 68 (1970); *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968) (search unconstitutional where agents searched pile of trees next to lodge and seized nine trees as evidence); *Sanders v. State*, 264 Ark. 433, 572 S.W.2d 397 (1978) (observation of garden located behind home and separated by fence from home impermissible); *Norman v. State*, 134 Ga.App. 767, 216 S.E.2d 644 (1975) (search unconstitutional where agents searched truck located behind barn behind house); *State v. Kender*, 588 P.2d 447, 60 Hawaii 301 (1978) (observation unconstitutional where officer climbed fence to observe plants hidden behind dense, tall vegetation in defendant's backyard).

Given the facts and case law, we believe the decision of the district court on this issue was correct.

V

The Sufficiency of the Evidence

[11] Each defendant, with the exception of Hensel and Duke, argues that the evidence against him was insufficient for conviction. On appeal, our task is to "consider the evidence as a whole, taken in the light most favorable to the Gov-

ernment, together with all legitimate inferences to be drawn therefrom, to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt." *United States v. Patterson*, 644 F.2d 890, 893 (1st Cir. 1981); *see United States v. Doran*, 483 F.2d 369, 372 (1st Cir. 1973), *cert. denied*, 416 U.S. 906, 94 S.Ct. 1612, 40 L.Ed.2d 111 (1974); *Parker v. United States*, 378 F.2d 641, 644 (1st Cir.), *cert. denied*, 389 U.S. 842, 88 S.Ct. 81, 19 L.Ed.2d 107 (1967). To convict the defendants of conspiring to import marijuana into the United States, the government bore the burden of proving that each defendant knowingly and intentionally joined that conspiracy. *See Direct Sales Co. v. United States*, 319 U.S. 703, 709, 63 S.Ct. 1265, 1268, 87 L.Ed. 1674 (1943); *United States v. Izzi*, 613 F.2d 1205, 1210 (1st Cir.), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 793 (1980); *United States v. Mora*, 598 F.2d 682, 683 (1st Cir. 1979) ("the gist of conspiracy is an 'agreement to disobey or to disregard the law'"). But, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development or collection of circumstances.'" *United States v. Stubbert*, 655 F.2d 453, 456 (1st Cir. 1981), *quoting Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). We apply these standards first to the strongest defense claims — those of Standley, Hubbard and Case. We then turn to defendants Wells and Dill.

A

Standley, Hubbard and Case

1. Standley, Hubbard and Case are three carpenters who moved to Maine and worked on the Turkey Cove property. We suspect the sufficiency of the evidence against them turns

on the proper use of two key pieces of evidence: a "preparation" and "clean up" list (Government Exhibit 110), and a payroll list (Government Exhibit 111), both of which government agents found in the bedroom where defendant Duke was working at the time of his arrest. Government Exhibit 110 consists of a yellow pad which includes: 1) a page entitled "Clean Up Crew 20 Minutes" that contains suggestions of things to be done to move the "bales" from the boat to the boathouse and van, and lists fourteen names including "Bobby" and "Flip" (*see* Appendix I); 2) nineteen pages headed "Master List," with numbers one through 950 in columns and a heading "Total per col. — wt" at the bottom of each column; 3) a page headed "Wet Ones List;" 4) a page listing "Total Gross Weight" and "Total Net" by truck; and 5) a page headed "Preparation Group 9:00 Dark" which lists six names including "Charlie," and "Bobby" (*see* Appendix II). Since independent evidence indicated that defendant Case was known as "Flip," and since the jury could reasonably infer that Charles Standley was known as "Charlie" and Robert Hubbard as "Bobby," these lists linked these men to the conspiracy. Government Exhibit 111 includes five separate pages marked A through E. One page, entitled "Pay Schedule," lists 24 names, including "Flip." Government Exhibit 111 does not refer to "Charlie" or "Bobby."

When the government initially offered the preparation, clean up, and payroll lists into evidence, the defendants objected to them as hearsay. The government invoked the "co-conspirator" exception, *see* Fed.R.Evid. 801(d)(2)(E), but also stated that it offered the lists not for the truth of the matter they asserted, but rather to allow the jury to infer that those named on the list were associated with the conspiracy from the *fact* that these lists were found in the bedroom when government agents entered the house. When arrested, Duke was writing on the payroll list (Government Exhibit III) and

the other list (Government Exhibit 110) was nearby. Cash ($2,000) was lying on Duke's desk, and a briefcase with $44,000 was on the bed nearby. The government believed the jury could circumstantially infer an association from these facts. The trial court, faced with the defendants' hearsay objection to the lists, told the jury when the exhibits were entered: "These papers are not admitted to show the truth of the statements made in them. You, as the jury, may consider them as providing any evidence that the contents of these papers are accurate or true."

Later during the trial, the court made the preliminary findings of a likely conspiracy required by *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977) and *United States v. Ciampaglia*, 628 F.2d 632, 638 (1st Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 365, 66 L.Ed.2d 221 (1980), and it concluded that the statements were admissible hearsay under the co-conspirator exception to the hearsay rule. *See* Fed.R.Evid. 801(d)(2)(E). When the court decided to remove the limiting instruction, however, the defendants claimed that they were prejudiced by this ruling on the grounds that they had relied upon the government's statement that it would not use the lists to prove the truth of the assertions they contained. Accordingly, the court rescinded this ruling. On the following day, the court heard argument on the purposes for which the government could use the lists. The government argued:

> We are not asserting that it in fact takes 20 minutes for the clean up crew to operate. We are not asserting that in fact "Flip" has the key. However, we are asserting that the fact that Mr. Duke was writing on one of the exhibits and the other was in close proximity with him at the time is an act of a co-conspirator from which the jury may draw certain inferences about the purpose of the act and the scheme included in it.

The court granted the government's motion to allow the use of the lists for the following purposes:

> [t]he exhibits do not constitute statements admitted for the truth of any assertion contained in them but that if the Jury finds that the Defendant Duke was writing on these exhibits at the time Special Agent Cunniff encountered Duke and that Defendant Duke was in custody and control of the exhibits at that time, the Jury may consider these two exhibits as circumstantial evidence from which you may draw inferences about the relationship among the various parties and items for plan, purpose, preparation and knowledge.

The judge himself gave no instructions to the jury concerning the use of the lists. However, during closing argument the government told the jury:

> You will recall that the Judge instructed you that these documents have not been admitted for the truth of the statements that are contained thereon . . . . You know, however, that at the time Mr. Cunniff went to the upstairs bedroom and encountered Mr. Duke that Mr. Duke was writing on Government Exhibit 111, the white paper, and also that he had $44,000 with him in a brief case and in cash. From these facts, Ladies and Gentlemen, you may consider Government Exhibits 110 and 111 as circumstantial evidence from which you may draw certain inferences about the relationship among the parties listed in those lists and inferences about the plan, purpose, preparation and knowledge of the people involved in this conspiracy.

Defense counsel moved for a mistrial on the basis of this argument, but the court denied the motion.

We believe the court's ruling was proper. The jury was not permitted to infer Standley, Hubbard, and Case's participation from the out-of-court written assertion by the maker of the list that the three were participants in the conspiracy. The jury was permitted to infer their participation from the fact that one actively involved in the conspiracy, namely Duke, possessed a participant's list on which their names were found. We recognize that inferring participation from the juxtaposition of the fact that Duke possessed lists containing their names with the fact that Duke himself was actively involved in the conspiracy may involve a use of the lists for a purpose closely related to hearsay. *See generally* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* 801-53 to 801-57 (1979). After all, the validity of making the inference 'that a defendant participated' from the fact 'that Duke possessed a list with defendant's name' depends in part upon Duke's state of mind in possessing the list. The inference is based, first, on the assumption that Duke *believed* the three were participants, and second, on the assumption that Duke's beliefs regarding the membership of the conspiracy were, in the context of the totality of the evidence, likely to be correct.

[12] Nevertheless, even if the jury's inference involved a hearsay-type of problem, the evidence was outside the scope of hearsay as defined by the Federal Rules of Evidence. *See* Fed. R.Evid. 801-806. The court allowed the jury to infer plan, purpose, preparation, knowledge, and association from Duke's possession of the list. Possession is conduct, and conduct is hearsay under the Federal Rules only if "intended . . . as an assertion." Fed.R.Evid. 801(a)(2). We do not see how Duke's possession of the list could have been "intended . . . as an assertion" of the defendants' role unless Duke had been staging an elaborate charade to implicate the defendants. If defendants believed that to be the case, however, they bore the burden of proving that the conduct was indeed intended

as an assertion, *see* Fed.R.Evid. 801 Advisory Committee note (a); 4 J. Weinstein & M. Berger, *supra*, at 801-62 to 801-63, and they offered no such proof. Similar evidence has been admitted as circumstantial evidence in other cases. *See e.g.*, *United States v. Marino*, 658 F.2d 1120, 1124 (6th Cir. 1981); *United States v. Mazyak*, 650 F.2d 788, 792 (5th Cir. 1981, *cert. denied*, 455 U.S. 922, 102 S.Ct. 1281, 71 L.Ed.2d 464 (1982); *United States v. Day*, 591 F.2d 861, 883 (D.C. Cir. 1978); *United States v. Ruiz*, 477 F.2d 918, 919 (2d Cir.) (*per curiam*), *cert. denied*, 414 U.S. 1004, 94 S.Ct. 361, 38 L.Ed.2d 240 (1973); *United States v. Canieso*, 470 F.2d 1224, 1232-33 (2d Cir. 1972). And, in any event, this use would *both* fit within the "co-conspirator" hearsay exception, Fed.R.Evid. 801(d)(2)(E) (as the district court properly found to apply), *and* would have come as no surprise to defendants.

Thus, we believe the jury could properly have used the lists as evidence that Duke believed Standley, Hubbard and Case were in the conspiracy and, hence, given Duke's central role, as evidence that they were, in fact, conspirators.

[13] 2. In addition to their first names being on the lists found in Duke's possession, there was other evidence from which the jury could infer that Standley, Hubbard, and Case knowingly and intentionally participated in the conspiracy. The jury could have believed that Hubbard, Case, and Standley were Georgia residents. It could conclude that the three were carpenters who had come to work on the Turkey Cove property in Maine during the time that the conspiracy was in operation. It could have inferred that they built shutters that fit on the *inside* of the boathouse windows to hide the marijuana that would be stored there. And it could have inferred that they saw the conveyor belt, the elaborate radio and communications equipment, the industrial vacuum cleaner, the vans, and the navigational charts — all of which were present on the Turkey Cove property.

We believe that a jury could reasonably find that Standley was a member of the conspiracy from the evidence regarding Standley's occupation, the likelihood that the carpentry work was in fact to be used to further a drug-smuggling conspiracy, the evidence that Standley was not from Maine, the fact that items like sophisticated radios, conveyor belts and industrial vacuum cleaners were likely to be seen by one working at Turkey Cove, and Duke's possession of a "preparation" and "clean up" list mentioning Standley. This case is unlike the cases reversing convictions where the evidence consisted of little more than mere presence at the scene of the crime. *See, e.g., United States v. Mora*, 598 F.2d 682 (1st Cir. 1979) (conviction reversed where defendant had traveled with woman carrying cocaine, but where there was no evidence that defendant knew woman carried drugs or that he had known her before trip); *United States v. Mehtala*, 578 F.2d 6 (1st Cir. 1978) (conviction reversed where only evidence against defendant was proof of her presence on ship containing drugs and evidence of a close relationship with captain during voyage, and where there was no evidence that defendant had embarked on voyage for any purpose other than pleasure and no indication of prior association with captain); *United States v. Francomano*, 554 F.2d 483 (1st Cir. 1977) (conviction reversed where defendants worked on ship carrying drugs, but where there was no evidence that they knew drugs were aboard and where there was evidence that they had sought passage on other ships and were sailing for sake of adventure). The presence of other incriminating evidence in this case makes it considerably more like *United States v. Irizarry*, 673 F.2d 554 (1st Cir. 1982) (conviction for aiding and abetting affirmed where defendant was present in hotel room with others, where agents saw one of the party take a gun out of a handbag, and where agents later found that gun and two others as well as marijuana hidden in ceiling and found marijuana in ashtray and bathtub).

If the evidence is sufficient to convict Standley, it is also sufficient to convict Hubbard, since virtually all the evidence against Standley was available against Hubbard. In addition, Hubbard was arrested while leaving the Turkey Cove property in Wells' tan jeep with Case and was described as having slouched down in his seat when the police agent approached. In the jeep, the police found elaborate radio equipment, books explaining how to monitor police radio frequencies, a navigational chart showing the course of a ship (which the jury could reasonably have believed was the PATRICIA) from Florida to the Gulf of Maine; navigational equipment; Duke's passport together with a luggage tag with Duke's name and address; photographs and an airline ticket for Standley; and a car rental contract and Howard Johnsons' receipt in Wells' name. When arrested, Hubbard had various slips of paper in his pocket with the first names or nicknames and telephone numbers of various co-defendants, as well as a slip of paper mentioning radios and rollers — items which the jury could reasonably conclude were used to guide and unload the PATRICIA. As noted at p. 23, *supra*, defendant Dill bought the SUNSHINE and the boat's radio equipment in Hubbard's name.

Similarly, the evidence against Standly and Hubbard was available against Case, whose nickname "Flip" appeared on both Government Exhibit 110 and Government Exhibit 111. Case was the driver of the tan jeep in which he and Hubbard were arrested, and in which the various paraphernalia described above were found. In addition, Case had on his person at the time of his arrest the keys to a large-capacity cargo van registered in Georgia which was found, loaded with radio equipment, at the Ramada Inn in Lewiston, Maine. We therefore find the evidence sufficient to allow the conviction of Standley, Hubbard, and Case.

B

Wells

Wells, too, challenges the sufficiency of the evidence linking him to the conspiracy. However, the jeep in which Case and Hubbard were arrested belonged to Wells. Wells and Hensel were long-time acquaintances, and one of the phone numbers that Hensel aboard the PATRICIA asked the mate of a nearby fishing boat to call was that of Wells. Wells did not live in the Turkey Cove area, but was seen with Duke on the SUNSHINE on May 20, 1980, in Panobscot Bay. On May 28, a John Wells and another person registered at a hotel in Portland, Maine, and calls were made from one of their rooms to the Turkey Cove property. Wells also rented a car, the contract for which was found in the tan jeep. And Duke had on him at the time of his arrest a book with Wells' name and phone number. This evidence is adequate to allow the jury reasonably to conclude that Wells knowingly and intentionally joined the conspiracy.

C

Dill

Finally, Dill claims that the evidence against him was insufficient. There was, however, considerable evidence linking him to the conspiracy. Dill lived in Georgia until early 1980, when he came to Maine and lived in one hotel after another. He bought a pick-up truck with over $3,000 in cash — from which the jury could reasonably conclude that he hoped to avoid leaving any trace of his transactions. Dill bought the SUNSHINE in Hubbard's name, and then outfitted the boat with radar and radio equipment, again in Hubbard's name. He paid for the boat and this material with cash and several separate checks. He told inconsistent stories about what he

planned to do with the boat. He had the boat repaired — for which he again paid in cash — and was observed using the boat. The boat was moored at the Turkey Cove dock, and DEA agents testified that small boats like the SUNSHINE are often used by drug smugglers to guide to shore larger vessels that carry the contraband. In addition, on March 20, 1980, Dill talked to a realtor about buying the Turkey Cove property (he did not then buy it) and paid special attention to the dock. When Hubbard was arrested, he carried two slips of paper with Dill's name and phone number, and "Craig 300" was written in a notebook found in the back of the jeep. While some of this evidence by itself may not be highly incriminating, we have no doubt that the jury might reasonably have concluded on the basis of the totality of the evidence that Dill knowingly and intentionally joined the conspiracy.

VI

Other Issues

Various of the defendants raise other arguments which do not require extensive discussion.

A

[14] Defendant Dill argues that the jury could not validly convict him on the basis of his having provided members of a conspiracy with a boat unless it also believed that he knowingly and intentionally agreed to join the conspiracy. Hence, he says, the trial court ought to have adopted his proposed instructions, which emphasized agreement, specific intent, and criminal knowledge. It is, however, well established that a court need not "deliver a requested instruction verbatim." *United States v. Winter*, 663 F.2d 1120, 1146 (1st Cir. 1981),

app. pending. And we are satisfied that the district judge's instructions were fair, impartial, and complete statements of the law, adequately emphasizing the need to find agreement, knowledge and intent. The district judge stated, for example,

> But what the law says is that before a jury may find that a defendant has become a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was willfully and knowingly formed and that the defendant willfully and knowingly participated in the unlawful plan with the intent to advance or further some illegal object or purpose of the conspiracy. In other words, although willful participation in a conspiracy may be established by circumstantial evidence, there must be some evidentiary basis for inferring that the defendant knew about the conspiracy and intended to participate in it and to make it succeed. . . . So if a defendant with understanding of the unlawful character of a plan voluntarily and intentionally encourages, advises or assists for the purpose of furthering the undertaking or scheme, that defendant then becomes a willful and knowing participant in the scheme; in other words, a conspirator.

These instructions were adequate. *See United States v. Irwin*, 593 F.2d 138, 140-41 (1st Cir. 1979); *United States v. Coast of Maine Lobster Co.*, 557 F.2d 905, 909 (1st Cir.), *cert. denied*, 434 U.S. 862, 98 S.Ct. 191, 54 L.Ed.2d 136 (1977). Other requested instructions based on *United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), were inappropriate here.

B

[15] Dill contests the admission of "expert" testimony by Agent Cunniff about the general practices of drug smugglers.

The issue is whether the risk of prejudice outweighed the probative value of Cunniff's testimony. *See* Fed.R.Evid. 403. On the one hand smuggling tons of marijuana is a complex matter. Agent Cunniff's testimony explained the methods drug smugglers generally use; thus it was testimony that would "assist the trier of fact to understand the evidence." Fed.R.Evid. 702, and helped the jury determine which alleged facts were material to the charges made against which defendants. On the other hand, Agent Cunniff sat at the prosecutor's table, and much of his testimony concerned behavior, such as making lists and buying boats, in which innocent people commonly engage. Although we recognize the risk of prejudice, the question facing the lower court was one of balance. "[T]he propriety of receiving expert testimony rests within the sound discretion of the trial court." *United States v. Fosher*, 590 F.2d 381, 382 (1st Cir. 1979). Similar evidence has been admitted in other cases. *See, e.g., United States v. Golden*, 532 F.2d 1244-1247-48 (9th Cir.) (*per curiam*) (DEA agent testifies about the price of drugs), *cert. denied sub nom. Trowery v. United States*, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976); *United States v. Sellaro*, 514 F.2d 114, 118-19 (8th Cir. 1973) (FBI agent testifies about bookmaking practices), *cert. denied*, 421 U.S. 1013, 95 S.Ct. 2419, 44 L.Ed.2d 681 (1975). "Given the broad discretion allowed a trial court in determining the admissibility of expert testimony," *United States v. Fosher*, 590 F.2d at 382, as well as the permissive language of Fed.R.Evid. 403, we find no error here.

C

[16] 1. Dill argues that the lower court erred in refusing to allow discovery of documents that he believes were essential to the cross-examination of Agent Cunniff. After Agent Cunniff

testified on direct examination (about the general habits of drug smugglers and his investigation of Turkey Cove), the defense sought, in the trial judge's words, "a vast number of DEA manuals, guidelines, reports and memoranda, opinions, rules or regulations issued by the United States Department of Justice, and also by the DEA, all relating to drug smuggling on the coast of Maine and the eastern seaboard of the United States." As the defense conceded, this material did not involve "any documents whatsoever which [were] involved in the investigation of this particular case." The trial judge believed that these documents were not essential to Dill's defense and that, given the timing of the request and the burden it would impose on the government, the request should be denied. Having reviewed the request and the testimony, we agree.

This general conclusion disposes of most of Dill's specific claims that one or another rule or statute required the district court to allow this discovery. Dill refers to Fed.R.Evid. 705. But, as the district court stated,

> Evidence Rule 705 provides that on cross-examination an expert witness may be required to disclose the underlying facts or data upon which his expert opinion was based. Mr. Cunniff testified that his expert opinion was based upon his prior experience in drug smuggling investigations along the coast of Maine. At no time did he indicate that that opinion was predicated upon the manuals, reports, rules and regulations production of which is here sought.

This statement is correct and dispositive.

[17] Dill refers to Fed.R.Crim.P. 16, governing discovery and inspection. But the district court held that the request under that rule was untimely ("as the defendants were on notice that this testimony would be presented over two weeks

ago prior to the start of the trial") and that the defendants had not shown how the documents were "material to the preparation of [their] defense." Rule 16 requests ordinarily must be made before trial. *See United States v. Jensen*, 608 F.2d 1349, 1357 (10th Cir. 1979); 2 C. Wright, *Federal Practice and Procedure* § 257 (1982). And rule 16(a)(1)(C) specifically limits discovery to documents "which are material to the preparation" of the defense. Accordingly, the district court's ruling was well within its power.

[18] Although Dill also refers to Fed.R.Crim.P. 17 governing subpoenas, that rule gives the district court adequate authority to deny a subpoena where production would be unreasonable. *See United States v. Nixon*, 418 U.S. 683, 698, 94 S.Ct. 3090, 3102, 41 L.Ed.2d 1039 (1974). Because the district court found the requested subpoena "far too broad," "untimely," and "harass[ing]," and since these findings were well within its discretion, *see United States v. Lieberman*, 608 F.2d 889, 904 (1st Cir. 1979), *cert. denied*, 444 U.S. 1019, 100 S.Ct. 673, 62 L.Ed.2d 649 (1980); 2 C. Wright, *supra*, at § 275, this rule does not help Dill. Moreover, since we believe the district court could reasonably find that the information sought was not "material" or necessary for effective cross-examination of Agent Cunniff, we reject Dill's "witness confrontation" claim under the Sixth Amendment. *See Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-46, 35 L.Ed.2d 297 (1973).

Finally, Dill argues the Jencks Act, 18 U.S.C. § 3500, and the Freedom of Information Act, 5 U.S.C. § 552, support his document request. But the defendants argued no FOIA or Jencks Act request to the court below, and they are therefore barred from pursuing those claims here. *See United States v. Campa*, 679 F.2d 1006, 1011 (1st Cir. 1982); *United States v. Carter*, 613 F.2d 256, 261 (10th Cir. 1979), *cert. denied*, 449

U.S. 822, 101 S.Ct. 81, 66 L.Ed.2d 24 (1980) ("By failing to make a timely motion for the production of the Jencks Act materials as the statute requires, appellants waived any right they may have had to complain on appeal of an alleged lack of governmental production."). There is no special circumstance warranting an exception.

2. Dill argues that the government violated its agreement under an April 8, 1981, court order to produce all Jencks Act materials at least five days prior to the start of the trial. The claim of violation was not made to the court below, and accordingly is waived.

[20] 3. Dill argues (in his reply brief) that the government violated the Jencks Act anew when it discussed testimony Agent Cunniff gave in other trials. However, a "transcript of a witness' testimony in a prior trial does not come within the language of the Jencks Act." *United States v. Baker*, 358 F.2d 18, 20 (7th Cir.), *cert. denied*, 385 U.S. 869, 87 S.Ct. 135, 17 L.Ed.2d 96 (1966); *cf. Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398, 79 S.Ct. 1237, 1240, 3 L.Ed.2d 1323 (1959) (grand jury minutes not covered by Jencks Act). Regardless, given the fact that the testimony is part of the public record, the government's failure to disclose the material would constitute harmless error. *See, e.g., United States v. Honneus*, 508 F.2d at 572-73.

D

Wells argues that his in-court identification by former Coast Guardsman Anthony Stewart, who had boarded the SUNSHINE when it was in distress on May 20, 1980, violated his Fifth and Sixth Amendment rights. During the trial, Stewart had been called to the courthouse to identify defendants Wells and Duke as the men he saw on the SUNSHINE. While waiting to meet with the U.S. Attorney, Stewart talked with three

Coast Guardsmen who were also at the courthouse to identify Wells and Duke. They had already identified the two men from photographs and assured Stewart that it was "easy to pick them out." After the U.S. Attorney had talked with Stewart about the case, the U.S. Attorney told him, in Stewart's words, to "just look around to see if [he] could pick them out." When Stewart went to the courthouse snack bar later that day, he noticed and identified Wells and Duke. The district judge described the incident as follows:

> The defendant was standing with a group of others, some eight or nine, of whom two may have been women, the others men; all dressed in civilian clothes in the lunch area in the courthouse; and without prompting or suggestion of any type, identified the two individuals in question. . . . [There is no] evidence to support a finding by this Court that the identification occurred as a result of an arranged confrontation . . . . While it's true that the witness Stewart was requested by the United States Attorney to keep his eyes open as he walked around the courthouse to see whether there was anyone whom he might identify, there is nothing in the record to support the finding by the Court that the actual confrontation which occurred was in any way prearranged by the United States Attorney's Office.

[21, 22] Wells claims that these circumstances amount to a violation of the Fifth Amendment. We disagree. The Fifth Amendment right to due process protects a defendant against unduly suggestive identification procedures. Thus, the right is invoked in identification situations to prevent "the primary evil" of "a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972), *quoting Simmons v. United States*,

390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); *see Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) ("reliability is the linchpin"). Stewart was not subjected to a suggestive encounter, nor was the incident orchestrated by the government. Neither the comments of the U.S. Attorney nor the comments of the Coast Guardsmen increased the likelihood that Stewart would identify Wells and Duke as the men aboard the SUNSHINE. *See United States v. Massaro*, 544 F.2d 547, 550-51 (1st Cir. 1976) (chance encounter in courthouse hall), *cert. denied*, 429 U.S. 1052, 97 S.Ct. 766, 50 L.Ed.2d 769 (1977). Accordingly, we find no violation of Wells' Fifth Amendment rights.

[23] Wells also claims a violation of the Sixth Amendment. But the Sixth Amendment right to counsel at identification sessions is designed to protect defendants from suggestiveness or other prejudicial acts that might otherwise take place. *See Moore v. Illinois*, 434 U.S. 220, 224, 98 S.Ct. 458, 462, 54 L.Ed.2d 424 (1977). The right to counsel at an identification session, the Supreme Court explained in *United States v. Wade*, 388 U.S. 218, 227, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967), depends on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and [on] the ability of counsel to help avoid that prejudice." *See also Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Since Stewart's identification of Wells and Duke was not arranged by the government, since it was not "suggestive," and since it was accidental, "we fail to see any harm resulting from the defense counsel's absence." *United States v. Massaro*, 544 F.2d at 551 (concerning an accidental identification in the courthouse halls) (opinion by Mr. Justice Clark).

E

[24] Finally, defendants argue that the agents' use of nightscopes, spotting scopes, binoculars, telescopes, and aerial sur-

veillance in observing activities on the Turkey Cove property violated their Fourth Amendment rights. After examining the record, we agree with the government that appellants are foreclosed from raising this issue on appeal by their failure to present it to the court below.

Toward the close of cross-examination of the government agents about their use of optical equipment, the district judge asked the defendants whether they claimed "that any Fourth Amendment rights are violated by the use of a telescope . . . or a nightscope to observe activity on a dock such as this." Counsel for defendant Duke responded, "No Your Honor. That's not our position." No one disagreed. Later in the suppression proceedings, the judge again asked whether the defendants contended that their Fourth Amendment rights were infringed by "observations made from the [observation post] across the St. George River." The judge stated that he believed that no violation could have occurred unless the sight-enhancing equipment permitted the agents to see inside the structures on Lot No. 3, and the defense counsel replied that that was "a correct statement of the law." This was a reasonable position to take, given the case law on the subject. *See, e.g., United States v. Lee*, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927) (Brandeis, J.) (approving use of search lights, marine glasses, and field glasses); *United States v. Lace*, 669 F.2d 46 (2d Cir. 1982) (approving use of nightscopes, 130-power Questar lens, and infra-red goggles on rural property); *United States v. Allen*, 633 F.2d 1282, 1289-90 (9th Cir. 1980) (approving use of helicopter surveillance of secluded sea-side ranch where airspace above property was routinely traversed by Coast Guard helicopters), *cert. denied*, 454 U.S. 833, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981); *United States v. Minton*, 488 F.2d 37 (4th Cir. 1973) (*per curiam*) (approving use of binoculars), *cert. denied*, 416 U.S. 936, 94 S.Ct. 1936, 40 L.Ed.2d 287 (1974). Finally, during oral argument at the

closing of the motion to suppress, no defense attorney argued that the officers' use of optical equipment constituted a Fourth Amendment violation. In these circumstances, we think the district court's finding that the defendants waived this claim, 509 F.Supp. at 1384 n.9, is supported by the record. *See United States v. Campa*, 679 F.2d at 1011 (argument not made below will not be considered on appeal absent special circumstances); *Langton v. Berman*, 667 F.2d 231, 233 (1st Cir. 1981); *United States v. Miller*, 636 F.2d 850, 853 (1st Cir. 1980) (*per curiam*).

For the reasons stated above, the convictions returned against the appellants are affirmed.

APPENDIX I

GOVERNMENT
EXHIBIT
110

6/30/80
Bed Upstairs Bedroom
Main House

Clean up Crew 20 minutes

I. Removal of rollers and plywood & saw horses from dock and other debrea; to be vaccumned check again around 1st light!! Important leave (3) 10' sections in boat house secure all other in garage Quietly!
bring vacumn to boat house — leave lock garage:
X-L Give Key to Flip

After outside and dock area are clean, everybody inside boat house start stripping bales, Don't strip pillows or any single bindings.

If we run out of space in boat house load white GMC

XL Bobby
Pete Pockets
Richey
Shawn
Bill
Mike
J.R.
Nasty
Gary
Rick
Bill

Evidence CE-80-0008

APPENDIX II

Preparation Group 9:00 Dark

Charlie
Bill

Bobby
Gary
Pockets
Rick

Evidence CE-80-0008

United States District Court
for
The District of Maine

UNITED STATES OF AMERICA
v.
DAVID KEITH HENSEL
DEFENDANT
CRIMINAL
DOCKET NO. 80-0030-01 P

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — July 16, 1981.

COUNSEL

___ WITHOUT COUNSEL
However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
XX WITH COUNSEL — Michael Avery, Esq.
(Name of counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea, ___ NOLO CONTENDERE,
X NOT GUILTY
There being a verdict of ___ NOT GUILTY. Defendant is discharged
XX GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of conspiracy to import, possess and distribute marijuana, a Schedule I controlled substance.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

The Court imposes a fine of $15,000.00.

The Court directs that defendant report to the institution designated by the Bureau of Prisons no later than 30 days from this date or on affirmance from the U. S. Court of Appeals.

SPECIAL CONDITIONS OF PROBATION
CONDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends:

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

X U.S. District Judge

/s/Edward T. Gignoux

Date: July 16, 1981

Vol II No. 57 (a)